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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1892.

TERM No. 419.

THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellant, vs. THE PEOPLE OF THE STATE OF ILLINOIS AND THE CITY OF CHICAGO.

TERM No. 608.

THE CITY OF CHICAGO, Appellant, vs. THE ILLINOIS CENTRAL RAILROAD COMPANY et al.

TERM No. 609.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellants, vs. THE ILLINOIS CENTRAL RAILROAD COMPANY, AND THE CITY OF CHICAGO.

TERM No. 610.

THE UNITED STATES, Appellant, vs. THE PEOPLE OF THE STATE OF ILLINOIS et al.

Argument for the City of Chicago.

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Argument for the City of Chicago.

Somewhat out of its order, but as a preliminary question, which, being decided, substantially disposes of the railroad company's appeal, the constitutionality of the act of the Illinois Legislature, passed April 16, 1869, may be first considered before passing to the consideration of the rights of the railroad as they existed prior to that act, and as they were affected by its provisions.

The constitution of Illinois, adopted in 1848, and in force at the time this act was passed, provided that "no "private or local law which may be passed by the Gen- "eral Assembly, shall embrace more than one subject, "and that shall be expressed in the title."

Sec. 23, Art. 3, Const. Ill. 1848.

Upon the reasoning contained in the opinion of the court below it is apparent that this act was essentially a local act. It may be true, in a broad sense, that every act touching the administration of the public property of a great municipality like Chicago, to some extent concerns the people of the State in which such a city is situated. But within the meaning of this constitutional provision, it is obvious that this falls within the classification of local or special laws, affecting particularly local interests rather than operating generally throughout the territory of the entire State.

The title of the act as it was introduced in the House of Representatives was: "An Act to enable the city of "Chicago to enlarge its harbor, and to grant and to cede "all the rights, title and interest of the State in and to "certain lands lying on and adjacent to the shore of Lake "Michigan, on the eastern frontage of said city" (*Trans.* 552); and under that title the bill was passed by the House (*Trans.* 559–60).

It is well settled in Illinois that for the purpose of testing the constitutionality of a law under this section of the constitution, the title of the bill as it passed each house must be examined, and not a title which may have been adopted after its passage.

Binz v. Weber, 81 Ill. 288.

(Over-ruling on this point *Larrison* v. *Ry.*, 77 Ill. 11.)
Johnson v. *People*, 83 Ill. 431.

After the bill passed the House the title was changed so as to read, "An Act in relation to a portion of the "submerged lands and Lake Park grounds, lying on and "adjacent to the shore of Lake Michigan, on the eastern "frontage of the city of Chicago." (*Trans. 561.*)

It is confidently submitted that an act conferring upon the railroad such additional powers and privileges as are claimed in this case, and bestowing upon that company practically the entire outer harbor of the city of Chicago, is not fairly within the scope and purview suggested by the title of an act to enable the city of Chicago to enlarge its harbor, and to grant and cede the right of the State to lands lands lying on and adjacent to the shore of Lake Michigan.

It was said by the learned court below:

"The general subject of each title is certain lands "lying on and adjacent to the shore of Lake Michigan on "the eastern frontage of the city of Chicago. The origi- "nal title suggested the enlargement by the city of its "harbor, and the cession of the rights, title and interest "of the State in the lands referred to, but to whom such "cession was to be made was not distinctly indicated." (*Trans. 212.*)

With great deference it is to be suggested that the title of the bill as passed by the House did not in any way relate to submerged lands, but only to lands lying on and adjacent to the shore of Lake Michigan. The suggestion in the title of the act as originally introduced was that it contemplated, not a grant by the State to any one of the bed of the lake, but simply a cession by the State of its

rights in certain lands lying on the shore of the lake, the adjective "adjacent" suggesting not at all the bed of the lake, but the land between the shore line and Michigan avenue extending so far from the water line as not to be properly called the shore of the lake. The title was entirely appropriate to the bill as originally introduced, where it provided, as its title indicated, not merely for the establishment of a harbor by the city, but a cession by the State to the city of its interest in the lake front, or the lands lying on and adjacent to the shore of Lake Michigan. (*Trans. 203.*) In so far as this act conferred any interest in the bed of the lake on the city it was simply in aid of the grant of power to enlarge the harbor to which the cession of the shore was also clearly pertinent.

Notwithstanding the decisions made by the courts of Illinois and other States sometimes in the obvious effort to sustain meritorious legislation against what appears to be a technical objection, it would seem to be a plain proposition that an act to increase the organic powers of the railroad company and to cede to it the bed of Lake Michigan for a mile out into the lake could not be fairly described as an act to enable the city to enlarge its harbor, or even an act to grant and cede the rights of the State in and to lands lying on and adjacent to the shore of the lake. This constitutional provision is mandatory, and under the later authorities in Illinois, was clearly infringed in this instance, and the act of 1869 is therefore unconstitutional and void.

Middleport v. *Ætna Life Ins. Co.*, 82 Ill. 562.
North Chicago Street Railway Co. v. *Lake View*, 105 Ill. 207.
Dolese v. *Pierce*, 124 Ill. 140.

Had the act when passed been entitled "An act in "relation to a portion of the submerged lands and Lake "Park grounds, lying on and adjacent to the shore of Lake "Michigan, on the eastern frontage of the city of Chicago," it might be plausibly argued that its subject was fairly expressed in this title. But to say in the first place that the first part of the title, when the bill was passed, which declared its object to be to enable the city to enlarge its harbor, is surplusage and may be wholly disregarded, and then further to say that the phrase to grant the interest of the State "in and to certain lands lying on and adjacent to "the shore of Lake Michigan, on the eastern frontage of "said city," is, when employed in connection with that declared to be surplusage, fairly to be considered as expressive of a purpose to grant the bed of the lake to some grantee other than the city, is, with all deference, a perversion of language and a violation of the plainest principles of construction.

The bed of the lake is not land or "lands." The Lake Front answered the description of lands lying on and adjacent to the shore. In order to include any purpose of dealing with the bed of the lake as part of one general scheme, it was thought necessary, in the first instance by the friends of the city, in the second by the friends of the railroads, to employ other language. Therefore the title of the bill as introduced proposed to enable the city to enlarge its harbor, this language suggesting such use of the bed of the lake as was necessary to the object proposed. The title as changed, presumably by its friends, after the act was passed, contained interpolated language to show that its object was to deal with submerged lands.

Evidently the friends of the measure were not satisfied that its original title was expressive of its object as finally passed, and accordingly this change was made. Clearly they were right unless the bed of Lake Michigan is, within the ordinary understanding of language, lands "lying on and adjacent to the shore." No language more descriptive, in general terms, of the Lake Front could have been employed, but it wholly fails to suggest the bed of the lake. But this is not a mere question of lexicography nor of syntax. The broad proposition that an act to enable the city to enlarge its harbor, and contemplating as a part of this plan a cession by the State of lands on the shore, is not an act to enable the railroad company to construct a harbor, and to cede the bed of the lake to that company would seem to be reasonable and tenable. The part of the first title which was vital was that referring to the power to be granted to the city to enlarge its harbor. What follows might well have been regarded as but a statement of that which was to be done in furtherance of this. The cardinal point to be accomplished was to provide for the establishment by the city of a harbor. All else in the title was superfluous and but suggestive of the means to be employed in aid of this large enterprise.

It is true that in the case of *B. & I. R. R. Co.* v. *Gregory*, 15 Ill. 20, cited in the opinion of the Circuit Court, the Supreme Court of Illinois passed upon the constitutionality of a law entitled "An Act to incorporate the Belleville & Illinois town Railroad Company," the fifteenth section of which authorized the city of Belleville and the county of St. Clair to subscribe stock in the corporation. This particular objection does not seem to have been brought to the attention of the court, and the court, except in so far as it held that the law did not

embrace more than one subject, expressed no opinion upon it. At p. 28, it was said:

"The first inquiry then, is, does this law embrace "more than one subject? The subject of this law is the "incorporation of a railroad company. No other subject "is introduced into the law, and but one company was "created by it. But it was urged that two roads were "authorized to be constructed by the law, if this exten- "sion is sustained. Even admitting that this would make "the law obnoxious to the constitutional objection, the "fact does not sustain the objection. With the extension "to Alton there will be but one continuous road, and that "on a much straighter line than many other roads in the "State."

In the case of *Middleport* v. *Ætna Life Ins. Co.*, just cited, on the other hand, the court held that a provision authorizing the issue of bonds in liquidation of appropriations voted under a prior act, was not germane to the subject expressed in the title of a bill, entitled, "An Act to "legalize certain aids heretofore voted and granted to aid "in the construction of the Chicago, Danville & Vin- "cennes Railroad Company," and accordingly held such provision to be void. In that case the town had voted an appropriation to the railroad company in 1867 under an act conferring no authority, either upon the township or its officers, to borrow money or to issue bonds for such a purpose. This appropriation having been voted and the township being unable to pay the amount thereof, acting under express authority of an act of 1869, the township proceeded to issue bonds in liquidation of that appropriation, and the provisions authorizing such issue were, by the Supreme Court, held to be void, as not germane to the subject of the act.

It would seem, too, even if the title of the act were held broad enough to cover a cession of the bed of Lake Michigan to the railroad company, in so far as it also attempted to confer additional powers on the company, the act would be obnoxious to the objection of embracing more than one subject.

President, etc., Lockport v. *Gaylor*, 61 Ill. 276.
Welch v. *Post*, 99 Ill. 471.

There are publicists who contend that State Legislatures, representing the sovereignty of the people, should be emancipated from all restraint, except such as is imposed by the Federal constitution and national legislation in pursuance of it; and that in this way better government would be secured through the necessity thus imposed upon the people of watching their representatives more closely, selecting them more carefully, and holding them to stricter accountability; and also that in this way the cause of local self-government by the people would be materially aided. Whether this be the correct view or not, it certainly is not the view which has obtained in this country. Rather has it seemed to be the idea that although legislative power is expressly committed to the State Legislatures, it should in some measure be shared both by the executive and the judiciary, and restraints in the nature of this constitutional provision have been imposed, not merely self-executing and acting on the legislative branch of the State government, but imposing upon the executive and the judiciary, before legislation is finally determined to be valid and effectual, the duty and responsibility of deciding upon the effect to be given to such constitutional provisions. They are imposed upon the essential idea that in popular government there is hasty

and ill-considered legislation; and that organic law should provide, therefore, for checks, balances and positive restraints against this tendency.

The effect of declaring this law unconstitutional would be to deprive the railroad of some of its extensions into the lake and the triangles south of Randolph street; and of course, should the court take this view, the decree should be reversed on the appeal of the city, and the cause remanded, with directions to enter the appropriate decree.

II.

In determining the rights of the parties to the shore and bed of Lake Michigan on the east front of the city between Randolph street and Park row, it would seem proper to consider, first, what the interest and rights of the railroad company were therein when the act of 1869 was passed; to then proceed to some consideration of the rights of the city and lot owners whose lots fronted on the lake front, including the rights of the city to wharf; to then discuss the nature of the rights of the State, both proprietary and public, in the bed of navigable waters, and to conclude the argument with a consideration of the true construction of the act of 1869, to which the rights of the railroad company must be referred; and the validity and effect of the repealing act passed by the Legislature on the 15th of April, 1873. Indeed, the discussion of all the other questions suggested is but preliminary to an attempt to reach the true construction of the act referred to. Further than has already been done, it is not, in this argument, intended to assail the validity or constitutionality of this legislation. It is thought that, rightly construed, it can be sustained as a legitimate

exercise of legislative power, and that, when its true construction is reached, there is no difficulty whatever in sustaining also the power of the Legislature to pass the repealing act of 1873, nor in determining the legitimate and proper effect of such repeal upon the rights claimed by the railroad company.

In the original charter of the Illinois Central Railroad Company, approved February 10, 1851, it was provided that the company should be incorporated under its present corporate name, and it was authorized to construct, maintain and operate a railroad from the southern terminus of the Illinois and Michigan Canal to Cairo, with a branch to Chicago, and another to Galena, and the company was made the beneficiary of the grants contained in the act of Congress passed Sept. 20, 1850, granting the right of way, and a grant of land to the States of Illinois, Mississippi and Alabama in aid of the construction of a railroad from Chicago to Mobile; and there was granted also the right of way, which the State of Illinois had theretofore obtained, along the line of such railroad and branches, together with a lot of ground obtained by the State in Cairo for a depot; and all grading, embankments, excavations, etc., constructed and done by or on behalf of the State on account of that road; and further grants were made as follows:

"Also, the right of way over and through lands "owned by the State are hereby ceded and granted to said "corporation for the only and sole purpose of surveying, "locating, constructing, completing, altering, maintain-"ing and operating said road and branches." (*Section 15; Trans. 616.*)

By section 3 (*Trans. 612*), it was provided that the corporation should have the "right of way upon and may

" appropriate to its sole use and control for the purposes " contemplated herein, land not exceeding two hundred " feet in width through its entire length; may enter upon " and take possession of, and use all and singular any " lands, streams and materials of every kind, for the " location of depots and stopping stages, for the purpose " of constructing bridges, dams, embankments, excava- " tions, station grounds, spoil banks, turnouts, engine " houses, shops and other buildings necessary for the con- " struction, completing, altering, maintaining, preserving " and complete operation of said road. All such lands, " waters, materials and privileges belonging to the State, " are hereby granted to said corporation for said pur- " poses."

It is to be noted in passing that this section apparently does not contemplate that by virtue of it the railroad should have any right to invade the navigable waters of the State. It is given power to enter upon and take possessions of streams and 'such waters," that is, stream belonging to the State, are thereby granted to the corporation for such purposes.

Having regard to the rules of construction which apply to the grant of corporate powers and privileges from the State, it cannot be successfully maintained that this provision in the charter would confer any right upon the corporation to invade the bed or waters of Lake Michigan. By the settled rule of Illinois, then already some time established and announced (*Middleton* v. *Pritchard*, 3 Scam. 518), the streams of the State, though navigable in fact, and including the Mississippi, were declared to be not navigable in law, and the beds thereof were held to be subject to private ownership. This section, then, furnishes no warrant to the railroad company for the location

of its track in Lake Michigan or upon its bed. The section concludes with a proviso against any construction of the act which would warrant the company in interrupting the navigation of "said streams." (*Trans. 612–3.*)

It is quite apparent, also, that this charter contemplated that the railroad company should take a right of way upon land not exceeding two hundred feet in width, and that the grant of land, waters, etc., belonging to the State to the corporation was for such purpose—namely, the right of way and use and control for the purpose of a railroad, as contemplated by the charter.

Between Randolph street and Park row the railroad company has, therefore, merely a right of way under its charter.

The charter also contained an express provision requiring the consent of the common council of any city within which it located its track. (*Sec. 8, Trans. 614.*) The exact language of the act is:

"Nothing in this act contained shall authorize said "corporation to make a location of their track, within any "city, without the consent of the common council of said "city."

The railroad company located its right of way along the lake shore, whether over what was the bed of Lake Michigan, strictly speaking, or what had been a sand bar up to about 1837, and then was suddenly destroyed by the action of the water due to the building of the government piers, as suggested by the testimony of Mr. Scammon (*Trans. 239–40–1*), will not now be particularly examined, though this question might in some possible aspects of the case be of no little importance.

Prior to this location, the territory being concededly within the corporate limits of the city of Chicago, the rail-

road company applied for and obtained the consent of its common council to the location of its road within the city limits, and entered into an agreement with that body, dated the 28th of March, 1853, accepting the location as established by the ordinance of June 14, 1852; section 2 of that ordinance provides:

"The said company may enter upon and use in "perpetuity for its said line of road, and other works "necessary to protect the same from the lake, a width of "three hundred feet, from the southern boundary of said "public ground near Twelfth street to the northern line "of Randolph street." (*Trans. 625.*)

After various provisions as to the manner in which the track shall be constructed and operated, section 6 provided that the company should erect and maintain fences on the west line of its right of way, with a proviso as follows:

"Provided, however, that the company shall construct "such suitable gates at proper places at the ends of the "streets, which are now or may hereafter be laid out, as "may be required by the common council, to afford safe "access to the lake. And provided also that in case of "the construction of an outside harbor, streets may be "laid out to approach the same, in the manner provided "by law, in which case the common council may "regulate the speed of locomotives and trains across "them." (*Trans. 226–7.*)

The next section provided that the company should construct a breakwater from the north side of Randolph street to the southern boundary of Lake park, at a distance of not more than 300 feet east from and parallel with the western or inner line pointed out for said company's right of way. (*Trans. 627.*)

The company did not see fit to avail itself of a right of way to the full width of three hundred feet, but, on the contrary, took a right of way of two hundred feet, and constructed its breakwater or shore protection two hundred feet east from the western line of its right of way instead of three hundred feet, as it might have done under the ordinance, though not under its charter, and it has since continued to use this right of way as thus limited and defined. The ordinance required the company to erect and complete this wall within three years after it accepted the ordinance. That time expired three years from the date of the agreement, which would be March 28, 1856, or three years from the date of the meeting of the Board of Directors authorizing that agreement, which would be Sept. 2, 1855.

Its tracks having been originally laid on trestle work, gradually this was filled; the city filled the ground to the west of the railroad right of way, and from Michigan avenue to the line of this breakwater is now all land.

There is, therefore, no difficulty in sustaining fully the views of the learned court below as to the rights of the railroad company in this way-ground from Randolph street to Park row. It was said in the opinion, after considering briefly the right of the city, as a riparian owner, to fill in the lake on the shore, and build walls to the extent required for the protection of the property of the city and its citizens;

"But, if that were not so, the city was expressly "given power by its charter to erect a breakwater or "barrier for protection against encroachment by the "waters of the lake. If it had itself erected a break-"water south of Randolph street, in front of fractional "sections 10 and 15, on the precise line adopted by

"the railroad company under the ordinance of 1852, "and filled in the space between the breakwater and "the shore line, it could not be doubted that it would "have become the owner of all the ground thus re-"claimed and occupied; but, instead of doing that work "itself, the city employed the railroad company to do it "in consideration of the grant to that company of the "privilege of entering the city and of laying its tracks "in front of Lake park grounds and of the open grounds "south of Randolph street. When the railroad company "established its breakwater, as it agreed with the city "to do, and filled in the space set apart for the right "of way, and when the space between the shore line "and the company's right of way was filled in by the "city, we cannot see but that the latter, as the riparian "owner of the land upon the shore line as it was be-"fore any of the filling was done, became also, with "the consent of the State, the owner of the fee of all "such ground, including that occupied by the railroad "tracks and the breakwater, such ownership being, how-"ever, subject to the use by the railroad company, "according to the terms prescribed by the ordinance of "1852, in perpetuity as a right of way, of the ground "upon which its tracks were laid." (*Trans. 202.*)

It is not, therefore, true that the railroad company was the owner of the fee of this right of way, as was argued in the court below, and may perhaps be argued in this court. The company acquired this property, whatever be the claim as to the true nature of its interest, solely as a right of way. A different question would be presented if the *locus in quo* were depot grounds occupied by the buildings of the company. Numerous decisions might be cited to establish this plain proposition. It was

declared clearly in *Rumsey* v. *N. Y. & N. E. R. R. Co.*, 114 N. Y. 423–29–31.

The court there said, construing the statutes of New York, which conferred some preference in the right to acquire lands below high water mark in the Hudson River to adjacent owners :

"The important question, therefore, is, can the rail-
" road company be regarded within the meaning of the
" statutes upon the subject of water grants, as an 'adja-
" cent owner' to whom the commissioners of the land
" office could grant lands under water for the promotion
" of commerce upon the river. It is very clear, I think,
" that it cannot. A railroad corporation has no capacity
" to acquire lands for any purpose except such as is
" defined in its charter. It may take and hold lands for
" railroad purposes, but it is not necessary to cite authori-
" ties to show that it could engage in no business, except
" such as would be incidental to the railroad business, and
" come plainly within the scope of its charter. Being a
" creature of law, it possesses those properties only which
" its charter confers upon it, either expressly or as inci-
" dental to its existence. It is not important to determine
" what estate the railroad company took in the land
" acquired for the construction of its road It may be
" conceded to be a fee. The statute makes it such. The
" more pertinent inquiry is, what capacity had it to deal
" with the lands acquired? If that capacity was a gen-
" eral one and equal to that possessed by a natural
" person, there would be some ground to argue that
" it was an 'adjacent owner' within the meaning of the
" statutes relating to water grants. But if it was, as
" I have stated it to be, a limited one, and the corporation
" could not make use of the lands for the purpose of pro-

" moting the commerce of the State upon the river, then " it does not come within the class of persons named by " said acts, and could not be a grantee of State lands for " the purposes named in the statutes."

Again:

" It is sufficient to say, however, in this case, that " there is no claim that the railroad company acquired " or used its land for any purpose except the construction " thereon of its road bed; and the ownership of lands used " solely for that purpose does not constitute the railroad " company an adjacent owner within the meaning of the " statute relating to grants of lands under water." This language would be equally applicable to the assertion of any right in the railroad company as riparian owner growing out of its location of a right of way on the shore of the lake. Also, *Jamaica, etc., corporation* v. *Chandler*, 9 Allen, 159.

At this time the city, as will more fully appear hereafter, had a right to wharf and build docks at the end of streets. It is proper to inquire, as it must be conceded that the railroad company entirely lacked such power at this time, whether it would be a sound construction of its charter and the ordinance permitting the location of its road upon the shore of this lake, to hold that the effect of that location was to wholly cut off all riparian rights of the city, although clearly the railroad company could not exercise any. It is the general doctrine that a grant of a right of way does not confer such nor similar rights.

Boston Water Power Co. v. *B. & W. R. R. Corporation*, 16 Pick. 512–21–2.

Harback v. *Boston*, 10 Cush. 295.

Gould on Waters, sec. 148.

It is believed, therefore, that it cannot be doubted that the railroad company had merely an easement or right of way in this land, which neither conferred any riparian right upon the railroad, nor affected such right in the owner of the land over which the right of way extended.

Banks v. *Ogden*, 2 Wall. 57.

It is to be observed, too, that, as will appear hereafter, the lake front being dedicated and devoted to a public use, the general language of grant in the charter was not sufficient to authorize the railroad company to enter upon any of this public property of the city already dedicated to another public use.

St. Louis R. R. Co. v. *Trustees*, 43 Ill. 303.

It would seem, therefore, that the railroad's right to so occupy land on the lake front must be referred to the ordinance of 1852, and that distinctly grants the company simply an easement or right of way and not title. This proposition is not inconsistent with the idea that the State may control the public use to which public property shall be devoted. It is founded on the idea that by the provision in the charter it was not intended to accomplish a diversion of public property then appropriated; and, therefore it was necessary for the railroad company to apply to the city for leave to locate its tracks within its limits; first, because the charter so provided, that provision having no reference to the question of how the railroad company should acquire a right of way over any particular property, but having been inserted in recognition of the general municipal control which the common council of a city ought to have over such matters; and, second,

in the absence of such charter requirement such application was necessary in order to confer upon the railroad company the right of way across this public ground, the control and administration of which were immediately in the city authorities, although perhaps remotely subject to legislative control, and because the general language in the charter under the case cited is not sufficient to confer such right as to property already applied to other public uses.

It would appear, therefore, to follow that the railroad company had, in respect to this property, a mere right of way, or right of user for its corporate purposes, and could not, therefore, have any rights as a riparian or littoral owner; nor does the existence of such right of way operate to cut off the riparian rights of any of the true shore owners. It is immaterial whether or not such a right of way may operate to render the riparian right of the city, or its right to wharf less valuable by making access to the water more inconvenient from the shore.

The proposition that the city could not open streets across the road-bed of the railroad company, except upon compensation for the taking of railroad property for that purpose, if conceded, does not affect at all the question of legal right now under consideration. If the right to require such compensation existed, it might have rendered the exercise of its rights less advantageous and beneficial to the city, but could not alter nor affect their essential character.

III.

That portion of the lake front north of Madison street being in section 10, was dedicated to public uses by a plat made the 7th of June, 1839, by Matthew Burchard, as agent of the Secretary of War, and entitled

Fort Dearborn Addition to Chicago. (*Trans. 178.*) It has been denied that this was a statutory dedication, but whether so or not is perhaps immaterial here. So much of the lake front as lies in section 15, from Madison street to Twelfth street, was platted and dedicated to the public use by a plat made by the canal commissioners on the 13th of June, 1836. (*Trans. 182.*) For the purposes of this argument it is immaterial to examine the history of the Federal and State legislation in which the title of these public officers has its source. It is given with some fullness in the opinion. (*Trans. 180–183.*)

It seems to be conceded that this plat was made in all respects in conformity to the statutes of Illinois and operated under the laws of Illinois to vest the fee to the lands east of the west line of Michigan avenue, as well as the other streets shown on the plat, in the city, and by similar title the city holds the public grounds in section 10. It will probably be argued that the city acquired no interest in this public ground in the nature of private property, but the fact that the city took legal title to the ground designated on the plat as Michigan avenue will probably be conceded. That fully appears from some of the authorities to be hereafter cited. As the title to this property passed to the State by congressional grant for canal purposes, and as the canal commissioners were in effect municipal agents of the State for the disposition of this property for the construction of the canal, it is probably true that the State should be regarded as the dedicator of this public ground to the public use. The argument for the railroad company proceeds on the theory that as the city had no interest in the nature of a private property interest in this land, but held it as an agency of the State, the Legislature of the State had power to devote such

property to any public purpose which might commend itself to the legislative discretion; and further, that, while if this dedication had been by an individual owning fractional section fifteen for a specific public purpose, he or his representatives would have had either a right of revertor or perhaps some right to insist upon an application of this property to the specific use to which it was devoted; that interest in this case existing in the State, the Legislature had full and plenary disposing power over the ground so dedicated, the State uniting in itself both the title of the sovereign and the reversionary interest of the dedicator. And it is said that the State might therefore have authorized the railroad company to lay its track on the lake front, although that had been dedicated to public use in the manner indicated, and although legal title to this land was in the municipality.

If we assume, without conceding, the soundness of this reasoning, it is to be observed that this position entirely ignores the rights of the owners of lots abutting on these public grounds, and which were purchased on the faith of this plat and this dedication. In considering this branch of the case it would, therefore, seem to be proper, first, to examine the rights of the city as a proprietor, and then to consider whether this property was dedicated to any specific public purpose; and, if so, whether, as against lot owners who purchased on the faith of such dedication, it could properly be diverted to public purposes of a different character. This again will be argued, not so much as a basis for denying the legislative power to so discharge the specific public use and substitute another, as for the purpose of reaching the legislative intent in the adoption of the act to which the railroad company refers its rights. It is not thought that there is any essential

distinction to be made in this respect between the public grounds in section 10 and section 15, so far as this argument is concerned, although it is literally applicable only to lands in section 15.

It may perhaps be assumed, without a formal concession on that point, that a city, under the statutes of Illinois, holds title to its public property acquired by dedication to general public purposes, subject to legislative control. It would seem to be, however, somewhat anomalous if the city of Chicago or the citizens of Chicago could be said to have absolutely no interest in this public ground and water front. Neither the city nor its inhabitants, perhaps, have a vested property right therein, but the city and its people would seem to have a sort of natural equity which ought to be regarded by the Legislature, and which this court ought to be slow to assume, that the Legislature would willfully and wantonly disregard.

It may be that those rights are of such a character that for their protection and assertion the municipality and its citizens must rely wholly upon legislative discretion and fidelity. It may be that as against legislative intent to the contrary clearly and unequivocally expressed, the city cannot effectually assert such rights. If so, this court will undoubtedly regard the presumption well and felicitously stated by a distinguished judge of a sister State in *Kingsland* v. *Mayor, etc., of New York* (110 N. Y. 569–584). This was a controversy between an individual and the city. To the suggestion that the State might destroy the wharf rights of the great port of New York upon the principles adopted in determining that case, Judge FINCH said:

"The cases are not parallel. The State has a double "right, as proprietor and as sovereign, and the capacity

" in which it acted might come in question; and the city " will hold its wharf rights and their incidents by a differ- " ent tenure from a bare license, and under authority of " law, and after having paid a very large consideration. " Without attempting to decide a hypothetical question " little likely to arise, since the State will hardly seek to " fence in its metropolis, it is enough to say that the cases " are radically different, as it respects the compensation " to be paid, and not such as to decide each other."

By the act of incorporation of March 4, 1837, there were included within the limits of the city fractional section 10, except the military post therein, and fractional section 15; and the common council of the city, by section 38, was empowered to lay out streets, alleys, lanes and highways in the city, and make wharves and slips at the end of streets on the property belonging to the city. (*Trans. 536–7.*)

By the act of February 16, 1847, the harbor was defined to include so much of Lake Michigan as lies within the distance of one mile from the shore thereof into the lake, and the Chicago River and its branches, including piers. (*Trans. 540.*) And further power to regulate the harbor was, by section 15 of that act, reposed in the common council. And the power to make wharves and slips at the ends of streets was again granted by section 11 of that act; and by the act of February 4, 1851, which was an act to reduce the law incorporating Chicago and the acts amendatory thereof into one act, the same authority was conferred. (*Trans. 540–542.*)

It would seem obvious that a fair construction of these charter powers would include the right of the city to build wharves on the lake front, or the east side, if it may

be so called, of Michigan avenue. That seems to be the clear purport of the decision of this court in

Potomac S. B. Co. v. *Upper Potomac S. B. Co.*, 109 U. S. 672.

At page 685 this court said :

" It is not denied and never was questioned that, as " to the streets whose termini abutted on the river, the " water front was subject to the riparian rights of the pub- " lic for use as a wharf or dock or landing place. On what " principle can a distinction be drawn between that case " and the one in hand, where the line of the river consti- " tutes the side of the street running along the shore ? " The rights of the public are the same, especially where, " as here, it was the owner of the soil of the street, as so " much land, for all purposes. The true inference to be " drawn from the plan of laying out such a street seems to " us to be to secure to the public the very rights here in " controversy, and to prevent private monopoly of the " landing places for trade and commerce. "

And so it has been held, as was suggested in the opinion of the court below, that where a city, under legislative authority to wharf, has constructed its wharves, it holds under its riparian right, and the right of private property would in that case attach.

Williams v. *Mayor*, 105 N. Y. 419.

The course, then, of legislation, as already indicated, suggests the legislative purpose to effectuate the dedication of this public grant as a water front or public landing place, authority to improve which should be vested in the city, and full municipal control over which and the adjacent harbor, should be committed to the city.

The city had made considerable expenditures on its harbor and for shore protection prior to 1869. (*Trans. 268 et seq.*)

It has been decided, in

Mayor v. *Williams*, *supra*,

that a right to wharf carries with it by implication such right to the soil under water as is necessary to the exercise of the wharf right.

If it be conceded that these rights in the city are held at the pleasure of the Legislature, then it may be said, to that extent anticipating the course of the argument, that if the act of 1869 be construed as devolving similar rights and privileges upon the railroad company as another or substituted public agency, and thus withdrawing them from the city, the company should be considered to hold those rights upon the same tenure as that of the city, prior to this substitution; and the grant in fee of the bed of the lake to be regarded wholly as in aid of the right to dock and wharf, expressing only what, by necessary implication, would have passed without formal grant.

Proceeding to examine more particularly the character and purpose of the dedication to public use of this water front, it is thought that both the evidence taken in this case and the reasonable inference which might properly be drawn in the absence of express evidence on the point, warrant the presumption that this public ground was dedicated and considered as a public landing place. Counsel for the city lack the advantage of consulting the argument to be submitted in this court on behalf of the railroad company, and venture, therefore, to assume, what may perhaps not prove to be the fact, that this case will be

there presented by them on very much the same lines on which it was argued below.

It was stated in the argument filed by the general counsel for the road in the court below, that Mr. Scammon testified that it was usual in laying out towns on the banks of rivers in the southern part of the State, to leave a large margin along the river for a levee, and that the same plan was carried out here in laying out fractional section 15. He states that General Thornton, who was the controlling spirit of the board of commissioners at that time, laid out Michigan avenue on the plat as a grand levee extending to the lake, and that at the sale the lots were described as fronting on that grand levee, and that they were prized a great deal higher, and brought a good deal more money because they fronted on that wide street that extended to the lake. An examination of the record shows that this, as is to be expected, was an accurate statement of Mr. Scammon's testimony. (*Trans. 442–3.*)

That such a purpose in the dedication of this water front would have been presumed without this direct testimony on the point, has been distinctly ruled by the Supreme Court of Illinois.

Godfrey v. *Alton*, 12 Ill. 29.

The case arose concerning land included in a plat made by an individual owner of property bordering on the Mississippi. After platting and, as the court held, dedicating the land between the lots bordering on a street fronting the river and the rivers, the owner claimed to have reserved the margin of the stream, and sued the city in trespass *quare clausum*. The city prevailed in the court below, and in the Supreme Court, that court holding that at the time of the dedication no pretense of a res-

ervation by the dedicators of any land on the border of the river had been made. There, as here, there was some testimony tending to show that the land so dedicated was laid out as a public highway and landing.

The court said (p. 36):

" The only question that arises here is, was it the in-
" tention to make this a public landing? That was the
" declared intention of the owners of the land, and their
" agreement with the other proprietors. But, in the ab-
" sence of any such expression, I should be equally clear,
" from the manner in which the ground was laid off, that
" it was for a public landing as well as for a street. On
" the north side it was bounded by block 92, and on the
" south by the river, varying in width according to the
" meanderings of the stream. This stream was a public
" highway; in contact with this, another easement is
" granted, and the very location of it shows that it was
" designed for the purpose of lading and unlading freight,
" and landing passengers from the water communication,
" as much as the laying out of an interior street would
" show that it was designed for the use of travelers by
" land."

The same doctrine is reaffirmed, and this case expressly approved in a much more recent case.

Village of Brooklyn v. *Smith*, 104 Ill. 429–436.

The court there said:

" Here is a town laid out upon the bank of a navi-
" gable river, and the idea of the street not extending to
" the river seems preposterous. Of what use to the
" proprietors would be the reservation to them of any-
" thing between the street and the river, and what a lessen-
" ing of the value of a town site upon a navigable stream

" would be the absence of a public landing? It must be " supposed that such a town is laid out with reference to " the use and enjoyment of the river. A public landing " would be viewed as a thing of prime interest, which " would be an element of value pertaining to every town " lot which was to be sold."

Again, p. 438, commenting on the effect of the vacation by the Legislature of the plat, the court observed:

" The legislative vacation of the original plat, in 1845, " is insisted up as an annulment of that plat. This might " well be, had there been no sale of lots; but at that time " many, if not all, the lots had been sold. The right to " the use and enjoyment of this water street for a street " and public landing, appertained to these lots as a val- " uable privilege, and the Legislature did not undertake to " do the unjust thing of destroying such rights."

After noting that the act of vacation contained an express provision that it should not interfere with the rights of purchasers, the court proceeded:

" The interests of these lot owners, by its express " terms, are unaffected by the act, and it is through this " village corporation that they may be protected and " asserted. The legal title to the streets is vested in the " corporation, for the use and benefit of the lot owners and " the public."

This, then, is the settled law of Illinois upon this subject and has been for over forty years. The case just cited indicates that the municipality may be heard in vindication of the rights of lot owners on the ground that it holds the legal title to lands so dedicated upon a trust of which they are to some extent beneficiaries.

It is not necessary to rely upon this principle to justify a consideration of the rights of lot owners in this

discussion; for recurring again to the proposition already cited that the ultimate point to be reached in this argument is the true construction of the act of 1869, it is to be said that this court will be slow to presume, even if the power be conceded, that the Legislature by that act proposed to do the "unjust thing" of disregarding the rights of lot owners in this subdivision, and turning over by an absolute grant to the railroad company the bed of Lake Michigan, thus vesting that corporation with full title and beneficial ownership therein. It is not contended that these lot owners have strictly and technically riparian rights in the premises, but they are beneficiaries of the trust created by the dedication, and have a right to insist, as held by this court, upon its specific execution.

Barclay v. *Howell's Lessee*, 6 Peters, 202.

The rights of abutting lot owners to insist upon the appropriation of property dedicated to a specific public use in accordance with such dedication is fully recognized in the following cases.

Trustees v. *Welch*, 57 Ill. 363–69.
Maywood Co. v. *Village of Maywood*, 118 Ill. 61–72.
Jacksonville v. *Jacksonville R. W. Co.*, 67 Ill. 540.
Morse v. *Carson*, 104 N. C. 431.
Zinc Co. v. *La Salle*, 117 Ill. 411.
Cincinnati v. *Whites' Lessee*, 6 Peters, 438.
Barney v. *Keokuk*, 94 U. S. 339–40–42.

The case of the *C., R. I. & P. R. R. Co.* v. *Joliet*, 79 Ill. 25–32–3, does not at all militate against this

proposition, for in that case the dedication was general for public purposes.

Potomac S. B. Co. v. *Upper Potomac S. B. Co.*, 109 U. S. 672–85–6–7.

In that case this court said :

" It can hardly be possible that the establishment of " the city upon the plan adopted, including the highway " on the river bank, could have left the right of establish- " ing public wharves, so essential to a great center of pop- " ulation and wealth, a matter altogether of private own- " ership; for even as to squares and lots that fell to the " public on the division, it is equally contended by the " appellants that those from whom they claim, with the " lots also purchased the public riparian right appurtenant " thereto, with power to convert it to private use. It was, " for this reason, held by the Court of Appeals of Ken- " tucky, in the case of *Rowan's Ex'rs* v. *Portland*, 8 B. " Monroe, 232, that where land along the river bank in a " town had been laid out and dedicated by the proprietor " for a public street, the dedication for that purpose car- " ried with it, as a necessary incident, the right in the " public to build wharves and charge wharfage for the use " thereof, to the exclusion of the original proprietor and " his alienees of any private right of the same character."

This case is cited to show that the dedication of public ground in this case must be presumed to be for the specific purpose indicated, and not for public purposes generally.

The case of *New Orleans* v. *U. S.*, 10 Peters, 652–717–20–23–30, is especially instructive. That was a proceeding instituted by the United States to restrain the city of New Orleans from making sale of a portion of the

water front, and a public street in that city. This court held, upon familiar principles, that the general government had no interest in the property, and reversed a decree of the District Court, granting the relief prayed, and remanded the case, with instructions to dismiss the bill.

The court considered at considerable length the doctrine of the law as to the dedication of property to public uses, and followed the two cases in 6 Peters, already cited. Among other things it was said:

"That property may be dedicated to public use, is a "well-established principle of the common law. It is "founded in public convenience, and has been sanctioned "by the experience of ages. Indeed, without such a "principle, it would be difficult, if not impracticable, for "society in a state of advanced civilization, to enjoy those "advantages which belong to its condition, and which are "essential to its accomodation. The importance of this "principle may not always be appreciated, but we are in "a great degree dependent on it for our highways, the "streets of our cities and towns, and the grounds appro-"priated as places of amusement or of public business, "which are found in our towns, and especially in our "populous cities. It is not essential that this right of use "should be vested in a corporate body; it may exist in "the public, and have no other limitation than the wants "of the community at large."

Again:

"The town of New Orleans was established, and the "plan as designated in the maps referred to, adopted "while the country was under the jurisdiction of the West-"ern Company; and the dedication to public use of the "vacant space in contest was made by it, so far as a

" dedication is shown by the plan and the indorsement of " the word quay upon it."

Further:

" If the dedication of this ground to public use be " established by the principles of the common law, is it " not of the highest importance that the accumulations of " the vacant space, by alluvial formations, should partake " of the same character, and be subject to the same use as " the soil to which it becomes united? If this were not " the case, by the continual deposits of the Mississippi, " the city of New Orleans would, in the course of a few " years, be cut off from the river, and its prosperity " impaired. If the city can claim the original dedication " to the river, it has all the rights and privileges of a " riparian proprietor."

The limitation upon the power of the sovereign over public property is stated as follows:

" It is admitted that the power of the sovereign over " the streets of a city is limited. He cannot alien them, " nor deprive the inhabitants of their use, because such " use is essential to the enjoyment of urban property. " And a distinction is drawn, in this respect, between the " streets of a city and other ground dedicated to public " use. The latter, it is contended, is not only under the " supervision of the king, as to its use, but he may sell " and convey it. Now, it would seem, in reason, that " the principle is the same in both cases. The inhabitants " of a town cannot be deprived of their streets, as the " streets are essential to the enjoyment of their property. " In other words, by closing the streets, the value of the " buildings of the town would be greatly reduced, if not " entirely destroyed. And if ground dedicated to public " use, which adds to the beauty, the health, the conven-

" ience, and the value of town property, be arbitrarily " appropriated by the sovereign to other purposes, is not " the value of the property, which has been bought and " sold in reference to it, greatly impaired? The value " may not be reduced to the same ruinous extent as it " would be to close the streets, but the difference is only " in the degree of the injury, and not in the principle " involved."

Again it is said :

" There can be no difference in principle, between " ground dedicated as a quay to public use, and the " streets and alleys of a town ; and as to the streets, " it may be asked whether the king could rightfully have " granted them. This will not be pretended by any one. " And it is believed that the public right to a common, is " equally beyond the power of the sovereign to grant, " unless he dispose of it under the power to appropriate " property to the national use, and then compensation " must be paid."

This case fully recognizes the principle that property devoted to a specific public use cannot afterwards be devoted to a public use distinctly different by the sovereign or legislative power.

These and other cases cited, and which will be cited, establish fully this proposition, and are applicable to this view of the case now before the court. It is clearly apparent from the testimony, and as matter of legitimate and necessary inference from the circumstances attendant on the dedication of this property to public use, that it was dedicated as a street and water front or landing place. Assuming, as contended by counsel for the railroad company, that the city has no such riparian rights or interests as would attach in favor of an individual owner of this

land, it is yet apparent upon reason and authority that that public use having attached and title having passed to the municipality under the dedication, the property becomes impressed with a trust in favor of lot owners who have bought under that plat and on the faith of that dedication to specific purposes.

And again, anticipating somewhat the course of the argument, while it would probably be no perversion of this property to select as the public agency for the purpose of improving the water front the railroad company in lieu of the municipality, it would undoubtedly be a gross breach of trust and legislative duty for the State to attempt to vest an indefeasible title in fee simple in the railroad company to the bed of Lake Michigan and the land adjacent to this water front. One sufficient reason for assuming that the Legislature did not so intend is found in the fact that the act of 1869 purports to convey only "the right and title of the State." These are simply words of quit claim and release, and involve no assumption of any right in the State paramount to the rights now under discussion.

This argument anticipates that the railroad company may here contend, as below, that the act of 1869 is to be construed as a legislative grant of property in which the State has both *jus privatum* and *jus publicum*, and to be construed as other legislative grants, and that its effect in conferring vested rights upon the railroad company is to be decided upon the principles applicable to such grants.

The case of *Barclay* v. *Howell's Lessee*, already cited, requires, perhaps, more particular examination.

The action was ejectment, brought by a party claiming title to land between the line of a street in the city of Pittsburg and the Monongahela River. The court

held that testimony as to the admissions and statements of the surveyor who made the plat were competent, and sustained the right of the city, in whose interest the defendants appeared, as against the plaintiff. Speaking of the inference to be drawn from the plat of this property, the court said (p. 504):

"There is nothing, however, on the plat which shows "any limits to the width of Water street short of the river "on the south. If a line had been drawn along its south- "ern limit, there would have been great force in the "argument that the ground between such limit and the "water was reserved by the proprietors. This would "have been the legal consequence from such a survey, "unless the contrary had been shown."

This is true as to the plat under consideration. It shows no eastern line of Michigan avenue except the lake. (*Trans. 182.*)

Discussing the limitations upon the power of the public authorities to divert property dedicated for a specific purpose to other uses, it was said:

"If this ground had been dedicated for a particular "purpose, and the city authorities had appropriated it to "an entirely different purpose, it might afford ground for "the interference of a court of chancery to compel a "specific execution of the trust, by restraining the cor- "poration, or by causing the removal of obstructions. "But, even in such a case, the property dedicated would "not revert to the original owner. The use would still "remain in the public, limited only by the conditions "imposed in the grant. It does not appear, however, "that the construction of wharves on the river and the "pavement of the ground have, in the least degree, ob- "structed its use as a street. The pavement has undoubt-

" edly promoted the public convenience ; and if the whole " line of the street were graduated and paved to the water " as a public way, it would be much more valuable than in " its present condition. The wharves cause no obstruc- " tions to the use of this ground as a street ; and whether " the city authorities have transcended their power in " raising a revenue from them, by the improvements " which have been made, is a question not necessarily " involved in the case." (pp. 507-8.)

The case of *Municipality No. 2* v. *Orleans Cotton Press*, 9 La. 436, seems to lay down principles which would require the court in this case to recognize the existence of riparian rights in the city, though there they were held to go to lot-owners on account of the failure of proof to show a dedication of the bank to public purposes.

Under the statutes of Illinois, the city of Chicago has power to lay out, open, widen and extend streets.

Sec. 63, Art. 5, Chap. 24, Rev. Stats.

In the exercise of this authority, it may invoke the power of eminent domain. It also has the power to control the finances and property of the corporation, both these powers being reposed in the city council. (Id.)

It has been the settled rule in Illinois for many years that a municipal corporation might subject a public street to the additional servitude of a railroad track without imposing any liability, either on the part of the city or the railroad, to abutting lot-owners for compensation, unless, in so doing, the street is so obstructed, as by embankments or otherwise, as to deprive the public and adjacent property-owners of the use of the street as a street. It is, nevertheless, held that the city may not invoke the power of eminent domain to condemn property for a street, and

then afterward allow railroad tracks to be laid in it, to the exclusion of all other uses; and that the city has no right to authorize railroad tracks to be laid in a street, so as to exclude the public use of the street as a street, so long as it so remains a public street.

Ligare v. *Chicago*, 139 Ill. 464.

The right of adjacent property owners to the use of streets, as such, is fully recognized in

Chicago v. *Union Bldg. Assn.*, 102 Ill. 379.

In that case it was held, as in the other cases which have heretofore been cited for the railroad, that the trust upon which the city holds its streets for the benefit of its citizens generally, is one which cannot be invoked by a citizen as such, if the municipal authority sees fit to disregard it. But that in no wise impairs the proposition that adjacent lot owners have a positive right to insist that the public streets shall continue to be devoted to the use for which they were originally dedicated, and on the faith of which dedication their lots were purchased.

In a very recent case in New York it is held that the owners of lots abutting upon a city street, the fee of which is in the municipality, have special and peculiar rights therein not common to the citizens at large, of which conceded property-right they cannot be deprived by the Legislature or the municipality, or both, without compensation; and that any use of such street inconsistent with its use as a public street, which interferes with those rights, is a taking of property within the meaning of the constitution. This case recognizes the general doctrine that streets in a city may, under legislative and municipal authority, be used for any public use consistent with their

preservation as public streets, although the use may be new, and impose an additional burden and subject lot owners to injury; and that the use of a city street for a horse or steam railway is a street use which may be permitted, unless it practically closes the street, and that for the injury from such permissible use adjacent lot owners have no legal redress.

Kane v. *N. Y. E. R. R. Co.*, 125 N. Y. 164.

It may be noted in passing that this case shakes very much the authority of *Gould* v. *Hudson River R. R.*, 6 N. Y. 522, which case has since been expressly overruled. The court used this language:

"The main question presented on this appeal is difficult of solution. There must be a property right in the street to authorize the maintenance of the action. The plaintiff's easements or rights in the nature of easements, are not created by grant or covenant. It is easier to realize the existence of these rights than to trace their origin. They arise, we think, from the situation, the course of legislation, the trust created by the statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be diverted to other and inconsistent uses. There is some analogy, we think, between the rights of abutting owners as against the public, and those acquired by the public against private persons in streets or highways by dedication. The public acquires upon acceptance of a dedication by the owner of land of a highway over the same, a perpetual easement therein for a highway, although there may be no deed, or writing, or covenant,

" and no formalities attending the transaction, such as is " required for the creation of an easement at common law. " The State has dedicated the streets in the city of New " York to be public streets. The abutting owners have " acted upon the dedication, and upon the pledge of the " public faith that they shall continue to be open public " streets forever. It would be gross injustice to deprive " them of the advantages intended, without compensation. " The dedication ought to be, and is, we think, irrev- " ocable."

To the same effect is *Rigney* v. *Chicago*, 102 Ill. 64, 82, except that in this case the court rests the right of an adjacent lot owner on the constitutional provision (cons. of 1870) against taking or damaging private property without compensation. The damage in this case was inflicted by the construction of a viaduct over one street across another, the plaintiff' premises being on the latter street, 220 feet west of its intersection with the former. That distinction is not material here as the act of 1869, if sustained as a grant in fee of the shore and soil under water, would not merely interfere with the public use to which the lake front was dedicated, but absolutely destroy it It would, thus construed, authorize the railroad to actually take the shore and bed of the lake to the destruction of the public interest in its dedicated use.

It thus clearly appears that the vacant space on this plat dedicated by the canal commissioners to public uses was not dedicated generally to the public use, but to such use as a street and landing place or water front; and that, by virtue of that dedication, title passed to the municipality impressed with a trust in favor of the public and adjacent lot owners. Whether that right in the owners of lots may be asserted by the municipality as held in the

case of *Brooklyn* v. *Smith*, decided by the Supreme Court of Illinois, and already cited, or whether it must be asserted by one of the lot owners, is not here material. Those lot owners are not parties to this proceeding, and if the city challenged, on this theory, the validity of the act of 1869, it might be material to inquire particularly as to whether the municipality could be heard in the assertion of this right. But its existence being once established, if it can be shown that the construction of the act of 1869 insisted upon by the railroad company violates that right, by perverting the property dedicated to public use as a public street and landing place, through a grant of the bed of the lake, adjacent to the water front, in fee to the railroad company, then it is apparent that one highly tenable objection has been found to any such construction of that piece of legislation. Irrespective of the question of power this court would be slow to assume, in the absence of the clearest and most positive language to the contrary, that the Legislature of Illinois intended or attempted to extinguish valuable and important vested property rights without providing for compensation, and in the effort to bestow upon a railroad company, without consideration, a grant of property of incalculable value. If it be said that section 1 contemplates a sale by the city, of lands west of the track and a part of the public water front, it is to be suggested that the act simply confers the power to sell on the council, and it is not to be presumed either that this body would disregard, or that the Legislature intended it should disregard, the rights of adjacent lot owners.

A municipality may, indeed, under legislative sanction, appropriate the public streets, but it must in such cases pay damages for the property rights of the owners of adjacent lots thus taken.

Myer v. *Teutopolis*, 131 Ill. 552.

If it be said that the grant of land north of Monroe street shows a clear intention on the part of the Legislature to disregard the rights and equities of the city and the interests of adjacent lot owners, the answer is that the State did not seek to do either, but simply to release the right and title of the State in these lands, leaving all other interests unaffected by this legislation, and subject to adjustment thereafter. There is much force in the suggestion that the act contemplated some action by the city. Section six conferred authority on the city council to quit-claim the city's interest, excusing, indeed, the grantees from payment of $600,000, unless the council acted on this authority, but not attempting in any way to vest the city's title, or that of lot owners in the grantees.

But if it be assumed that the legislative intent was to vest full title and beneficial ownership in the railroads as to this land, to the exclusion of all others, no such inference as to the grant of the bed of the lake is admissible. Nor ought this court to so hold, even if of opinion that as to the land north of Monroe street, the Legislature intended to disregard private rights in its bestowal upon the railroads. As to that land, there was contemplated a sale for a large sum, which should go to the city. Such sale limited, but did not destroy the water front. As all claim under this part of the act has been abandoned, it is not necessary to discuss it at any length, but it is thought that full consideration of the entire act, including these provisions, will not suggest any other construction than that contended for in this argument.

IV.

It has been heretofore contended on behalf of the railroad company that the State might grant to the company the bed of Lake Michigan in the same way that the State or nation can grant lands in aid of railroads, and that the effect of the act of 1869 was to be ascertained, and the rights of the company measured by the principles which would apply to a legislative grant of lands in aid of the general purposes of a railroad.

It may not be improper to quote the language employed in the brief below for the company upon this point. It is to some extent as follows:

"The act of 1869 contained a grant of lands belonging to the State, and no consideration for the grant was necessary to support it. It is competent in general for an owner of property to dispose of his estate as he pleases. He may sell it for a money consideration. He may convey it for certain specific uses, or he may give it away without any consideration and free from restrictions or conditions."

And the case of *Fletcher* v. *Peck*, 6 Cranch, 87, was relied on to establish that a grant of land made by the State and accepted by the grantee, is an executed contract, which cannot, consistently with the federal constitution, be impaired by subsequent State legislation.

It is necessary to an intelligent examination of the effect and true construction of this so-called legislative grant to consider with some care the nature of the title or ownership which the State has in the bed of navigable waters within its borders.

It is commonly said that the State holds title to the bed of navigable waters in right of its sovereignty,

uniting in its title both the public right and the proprietary title, in trust for the benefit of the people of the State, or the public at large, for the purposes of navigation, and to some extent of fishery. The nature and character of this title has been very fully considered and discussed by this court and by the courts of the various States. It is conceded that Congress, under its constitutional power to regulate commerce, has paramount authority over the navigable waters of the country, and that the jurisdiction of the federal courts in admiralty extend over these waters, although above the ebb and flow of the tide and held in some States not to be navigable so as to vest in the State title to the land under water. Expressions may be found in the opinions written in some of the cases hereafter to be cited which indicate that the title of the State to land under navigable water is absolute, and that it has full disposing power over the same. It is not thought that there is authority for this, nor that such a view of the interest of the State is the true one.

Title to the bed of navigable waters in the Northwest Territory vested in the general government temporarily upon the cession from Virginia. It passed to the several States as to waters within their borders upon the admission of those States into the Union, not by grant, but by operation of law. The State holds title to such land subject to the rights of public navigation, subject also to the riparian rights of shore owners, and as to the land under water adjacent to the lake front, subject to the rights of the adjacent lot owners to have that water front continued as a public landing. Whether under the commerce clause in the constitution there could be in effect a theoretical reservation of some interest in property of this character in the general government, as the beneficiary of the trust

in the interest of public navigation on which the State holds title to the bed of navigable waters, there is certainly in that clause a practical restraint upon the plenary legislative power of the State. It cannot exercise that power like the Parliament of England in destruction of the public rights of navigation, but only in aid thereof. Those rights are accordingly fixed beyond the power of State control by the constitutional power reposed in Congress, and to the federal legislature the people rightly look for the execution of this public trust by the State.

Before proceeding to consider the general principles adopted by this court in dealing with this question, it may be well to note a distinction which obtains between tidal and non-tidal waters. Much that is said in the English cases and by English writers upon the title of the sovereign to land under water, is only applicable to the bed of tidal waters. There is no shore, properly speaking, in non-tidal waters. Legislative grants of land under navigable waters in this country have generally been restricted to an attempt to dispose of the shore or flats, which are not ordinarily susceptible of any general and beneficial public use for the purposes of navigation. Such has been the character of the grants generally around New York and Boston, and other of our large seaports.

Hale, discussing the right of the sovereign to the bed of the sea, uses the following language:

"The next evidence of the King's right and propri-
"ety in the sea and the arms thereof, is his right of pro-
"priety to
"The shore; and
"The Maritima Incrementa.

"(1.) The shore is that ground that is between the
"ordinary high-water and low-water mark. This doth,

" *prima facie* and of common right, belong to the King, " both in the shore of the sea and the shore of the arms " of the sea; and herein there will be these things exam- " inable:

" *First*—What shall be said the shore, or *littus maris?*

" *Second*—What shall be said an arm or creek of the " sea?

" *Third*—What evidence there is of the King's pro- " priety thereof?

" 1. For the first of these it is certain, that that " which the sea overflows, either at high-spring tides or " at extraordinary tides, comes not as to this purpose " under the denomination of *littus maris;* and conse- " quently the King's title is not of that large extent, but " only to land that is usually overflowed at ordinary tides. " And so I have known it ruled in the Exchequer-cham- " ber in the case of Van Laesdanke on prosecution by " information against Mr. Whiting, about 12 Car. 1, for " lands in ——, in the County of Norfork, and accordingly " ruled 15 Car. B. R. Sir Edward Heron's case, and " *Pasch*, 17 Car. 2, *in Saccario*, upon evidence between " the Lady Wansford's lessee and Stephens, in an *ejectione* " *firmæ* for the town of Cowes, in the Isle of Wight. " That, therefore, I call the shore, that is between the " common high-water and low-water mark, and no more."

Hargrave 12 v. *et*, Id. 25–6.

As to the great lakes there is strictly neither high nor low water mark, though they vary somewhat in height as appears from observations running through a long period of years, and sometimes vary considerably within a few days or even hours at particular points, owing to the direction of the wind. But the permanent line is so

unchangeable that the Supreme Court of Illinois has adopted it as the line of boundary for lands bordering upon the lake, and declared that the line at which the water usually stands is the limit of private ownership, holding title to the bed of the lake to be in the State in virtue of its sovereignty, although as to the great navigable rivers, including the Mississippi, the same court holds that shore owners take to the middle thread of the stream.

Seaman v. *Smith*, 24 Ill. 521.

It is thought that the disposing power of the State over what is technically called the shore of the sea, might well be absolute and unquestioned, and that the decisions of this court upon the subject warrant a distinction between the power of the State to dispose of such lands and its power to grant the bed of Lake Michigan for a mile out into the navigable water of the lake.

One of the earliest, if not the earliest case in this country, in which this subject was considered, was the case of

Brown v. *Kennedy*, 5 Harr. & J. 195.

In that case it was held that there was a common right and interest in a navigable stream, such as a right of fishing and navigating, which cannot be abridged or restrained by any charter or grant of the soil or fishery, since Magna Charta at least, but that the property in the soil may be transferred by grant, subject to this public right.

This decision seems to be based largely on the common law, and probably is not strictly in accordance with the weight of modern American authority.

The subject was extensively considered in a case decided about that time in New Jersey.

Arnold v. *Mundy*, 1 Halsted, 1.

In a very interesting and able opinion the court laid down the principle that there is in a nation a kind of public property which is common to all its citizens, title to which cannot well be vested in all the people according to the common notion of title, and which is, therefore, treated as lodged in the hands of the sovereign power, to be held, protected and regulated for the common use and benefit, and that the bed of navigable waters was of this character of property.

In the course of that opinion the court makes this suggestive observation:

"It proves that the wisdom of the law has placed the "titles of rivers, etc., in the king; that if the river shall "leave its bed, or if otherwise there shall be alluvions or "derelictions by the waters, the land so made shall then, "and not before, belong to the king as part of his "domain; and that he has an exclusive right, in these "waters, to his royal fish and swans, but it proves no "more. Nay, indeed, it does prove more, for the very "position that he has an exclusive right to the royal fish "and swans proves that he has no such right to any "others. It would be absurd to contend that he has an "exclusive prerogative right to these fish and swans, if "he had also the same right to all the fish in the river, "and all the aquatic birds upon it."

Concluding, this language is used:

"I am further of opinion that, upon the revolution, "all these royal rights became vested in the people of "New Jersey, as the sovereign of the country, and are

" now in their hands; and that they, having themselves, " both the legal title and the usufruct, may make such " disposition of them, and such regulation concerning " them, as they may think fit; that this power of dispo- " sition and regulation must be exercised by them in their " sovereign capacity; that the Legislature is their rightful " representative in this respect, and, therefore, that the " Legislature, in the exercise of this power, may lawfully " erect ports, harbors, basins, docks and wharves on the " coasts of the sea and in the navigable rivers; that they " may bank off those waters and reclaim the land upon " the shores; that they may build dams, locks and bridges " for the improvement of the navigation and the ease of " passage; that they may clear and improve fishing " places, to increase the product of the fishery; that they " may create, enlarge and improve oyster-beds, by plant- " ing oysters therein, in order to procure a more ample " supply; that they may do these things, themselves, at " the public expense, or they may authorize others to do " it by their labor, and at their own expense, giving them " reasonable tolls, rents, profits or exclusive and tempo- " rary enjoyments; but still this power, which may be thus " exercised by the sovereignty of the State, is nothing " more than what is called the *jus regium*, the right of " regulating, improving and securing for the common " benefit of every individual citizen. The sovereign power " itself, therefore, cannot, consistently with the principles " of the law of nature and the constitution of a well- " ordered society, make a direct and absolute grant of the " waters of the State, divesting all the citizens of their " common right. It would be a grievance which never " could be long borne by a free people."

While this case has been criticised, and, to some extent, denied to be the law in New Jersey:

Gough v. *Bell*, 1 Zab. 156–65,

it was the basis of the decision of this court in the great leading case of

Martin v. *Waddell*, 16 Peters, 367.

Whether or not the language quoted requires some modification, it is certain that if the State holds title to the bed of navigable waters upon the public trust indicated, no alienation or disposition of such property by the State which does not recognize and is not in execution of this trust, can be deemed to be permissible.

The subject has been fully discussed by this court in other cases.

Pollard's Lessee v. *Hagan*, 3 How. 312.
Den v. *Jersey Co.*, 15 How. 426.
Mumford v. *Waddell*, 6 Wall. 423–26.
Weber v. *Harbor Commissioners*, 18 Wall. 57.
McCready v. *Virginia*, 94 U. S. 391.
Barney v. *Keokuk*, Id. 324.
Manchester v. *Massachusetts*, 139 U. S. 260–262.

In the latter case this court quoted with approval from the language of Mr. Justice Curtis in

Smith v. *Maryland*, 18 How. 71,

where he said, speaking of the soil below low-water mark, among other things:

"But this soil is held by the State, not only subject "to, but in some sense in trust for, the enjoyment of cer-

" tain public rights, among which is the common liberty " of taking fish, as well shell-fish as floating-fish."

Certainly the right of a State to regulate the taking of fish in its navigable waters cannot be questioned. It was fully recognized by this court in that case; but the right of the State to regulate the taking of fish by general law, rests not upon its proprietary title to the bed of such waters, but upon its sovereign power.

Parker v. *People*, 111 Ill. 581.

It is believed whatever may be said of the power of the English crown or of the Parliament of England, in the exercise of its familiar legislative omnipotence, to bestow by grant legal title to the bed of navigable waters upon individuals, subject to the public rights in such waters, no such absolute right exists in the States of this Union, although it may be that where grants are made not in the execution of the public trust on which the State holds title to land under navigable water, the action of the State cannot be called in question at the suit of an individual. But it is thought that the true view was expressed by Mr. Justice Bradley, in

Stockton v. *B. & N. Y. R. R. Co.*, 32 Fed. Rep. 9.

It was there laid down by that learned judge that after the revolution lands under navigable streams and waters in New Jersey were held by the State in trust for the public use for navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons and other facilities of navigation and commerce. This language also was employed :

" Being subject to this trust, they were *publici juris ;* " in other words, they were held for the use of the people at

" large. It is true that to utilize the fisheries, especially " those of shell fish, it was necessary to parcel them out to " particular operators, and employ the rent or considera- " tion for the benefit of the whole people ; but this did not " alter the character of the title. The land remained sub- " ject to all other public uses as before, especially to those " of navigation and commerce, which are always paramount " to those of public fisheries. It is also true that portions " of the submerged shoals and flats, which really inter- " fered with navigation, and could better subserve the " purposes of commerce by being filled up and reclaimed, " were disposed of to individuals for that purpose. But " neither did these dispositions of useless parts affect the " character of the title to the remainder. Such being the " character of the State's ownership of the land under " water—an ownership held, not for the purpose of emolu- " ment, but for public use, especially the public use of " navigation and commerce — the question arises whether " it is a kind of property susceptible of pecuniary compen- " sation, within the meaning of the constitution."

This decision was expressly approved by this court in *Manchester* v. *Massachusetts*, already cited. And in the case of *Hardin* v. *Jordan*, 140 U. S. 371, Mr. Justice Bradley, speaking for this court, announced the same doctrine. This language was used in that case :

" Such title being in the State, the lands are subject " to State regulation and control, under the condition, " however, of not interfering with the regulations which " may be made by Congress with regard to public naviga- " tion and commerce. The State may even dispose of the " usufruct of such lands, as is frequently done by leasing " oyster beds in them, and granting fisheries in particular " localities ; also, by the reclamation of submerged flats

" and the erection of wharves and piers and other adventi-
" tious aids of commerce."

There is no hint in this of any absolute disposing power in the State over the bed of navigable waters which may be exercised irrespective of the trust in favor of public navigation upon which the State holds its title. Certainly title to flats and to land under shallow water may be conferred by the State. But a grant of the bed of water actually navigable and useful for the purposes of public navigation is not contemplated by the law, is a breach of the high public trusts reposed in the State, and a direct violation of the commerce clause of the Federal Constitution.

The Court of Appeals of New York has indicated clearly that in its judgment the title of the State to the bed of navigable waters is essentially inalienable. This opinion seems to be expressed in a case touching the ownership of the bed of an inland lake which was in a region concerning ownership and jurisdiction over which there had been much controversy between the States of Massachusetts and New York. By treaty between those States New York ceded to Massachusetts all proprietary rights to this land, except the right and title of sovereignty and jurisdiction, and Massachusetts ceded to New York all claim to the government and sovereignty of such lands. Upon this the court, speaking by Chief Judge Ruger, observed:

" Subsequent to this treaty there remained in the
" State of New York only *such rights of property in these*
" *lands as necessarily pertained to its sovereignty, and*
" *were inalienable by the sovereign.* All such rights of
" property in or to the territory in dispute as could, by
" the most comprehensive and absolute conveyance, be

" granted to another were, by this treaty, conferred upon " the Commonwealth of Massachusetts and its grantees. " (Citing cases.) The settlers in this territory derive the " title to their lands from the Commonwealth of Massa- " chusetts, and have become possessed of all of the rights " which that State acquired in such lands by virtue of the " treaty of cession or otherwise. It now remains to con- " sider the nature *of the rights of property which pertain* " *exclusively to sovereignty*, and which do not pass to the " grantee under a conveyance of the soil bordering upon " and adjoining fresh-water navigable lakes and rivers."

The court further observed:

" It may also be affirmed that if the term navigable " water, as used in England, was ever there for any pur- " pose wholly restricted to the waters which were affected " by the ebb and flow of the tide, it has by common con- " sent a more enlarged signification in this country, and is " here held to mean all such waters as are actually navi- " gable, whether fresh or salt. When it is considered " that the rights and interest of the public, such as fishing, " ferrying and transportation, are preserved in all navi- " gable waters by the inherent and inalienable attributes " of the sovereign, it would seem to follow that the con- " troversies which have arisen over the nominal owner- " ship of the soil under such waters have been magnified " beyond the real interest involved."

Smith v. *Rochester*, 92 N. Y. 463.

The Supreme Court of Oregon, discussing the riparian rights of shore owners upon tide waters, used this language:

" They are not rights, as has often been supposed, " that were derived from the State, though held and

" enjoyed in subordination to the rights of the public. " (Citing cases.)

" The embarrassing feature of this subject has arisen " out of a misunderstanding of the nature of the State's " ownership of land between high and low water upon " navigable streams. It has been spoken of as an owner- " ship in fee, and an erroneous impression has been con- " veyed. The State does own the channel of the navi- " gable rivers within its boundaries, and the shore of its " bays, harbors and inlets between high and low water, " but its ownership is a trust for the public. It has no " such proprietorship in them as it has in its property and " public buildings. It cannot sell them so as to deprive " the public of their enjoyment. (Citing cases.) Nor can " it take away riparian rights, except for public use, and " by giving just compensation. (Citing authority) The " New York courts have taken a different view, and which " has been followed by an Iowa decision. (Citing case.) " But it is repudiated by the federal and most of the State " tribunals."

Wilson v. *Welch*, 12 Ore. 353.

The reference to the New York doctrine, is founded on a misapprehension due probably to views announced by the Court of Appeals in that State in the Gould case.

A recent writer upon the law of eminent domain upholding the doctrine that riparian owners have valuable rights appurtenant to their estate, of which they can not be deprived without compensation, uses this language :

" This seems to us the better and sounder rule. The " opposite conclusion has been reached by a narrow and " technical course of reasoning, based upon the fact that " the title to the soil is in the State, or the public. It is

" assumed that this title gives the State the same absolute " and exclusive control of the waters and their bed, as an " individual possesses over his private property. But " there is really no analogy between the relations of a " riparian owner to the waters upon which he abuts and " the relations between the proprietors of adjoining lands. " The State holds the title to public waters as a trustee, " merely for the use of all the public in common. The " very object of declaring the title in the public is the bet- " ter to secure this common use and benefit. The ripar- " ian owner is peculiarly situated for the enjoyment of " these advantages. He has rights in the waters upon " which he abuts, which no private owner has in the lands " of his neighbor. No private owner holds his lands for " the purpose of being used by his neighbors and the " public."

Lewis on Eminent Domain, sec. 78.

In the case of *Pollard's Lessee* v. *Hagan*, already cited, it clearly appears that the proprietary interest of the State in the bed of navigable waters pertains to sovereignty.

The court observed :

" This supposed compact is, therefore, nothing more " than a regulation of commerce to that extent among the " several States, and can have no controlling influence in " the decision of the case before us. This right of " eminent domain over the shores and the soils under the " navigable waters, for all municipal purposes, belongs " exclusively to the States within their respective territorial " jurisdictions, and they, and they only, have the consti- " tutional power to exercise it. To give to the United " States the right to transfer to a citizen the title to the

" shores and the soils under the navigable waters, would be " placing in their hands a weapon which might be wielded " greatly to the injury of State sovereignty, and deprive " the States of the power to exercise a numerous and im- " portant class of police powers. But in the hands of the " States this power can never be used so as to affect the " exercise of any national right of eminent domain or " jurisdiction with which the United States have been in- " vested by the constitution. For, although the ter- " ritorial limits of Alabama have extended all her sov- " ereign power into the sea, it is there, as on the shore, " but municipal power subject to the constitution of the " United States 'and the laws which shall be made in " pursuance thereof.'"

It thus appears that the right of the State to hold the soil under its navigable waters for all municipal purposes is exclusive. But the principle that the Legislature of a State has plenary powers of legislation, in the absence of constitutional restriction, has been invoked to show that the Legislature of Illinois in the exercise of its municipal sovereignty, might grant the title of the State to the soil under its navigable waters, and it has been declared by counsel that there is no inhibition in the State constitution against such a grant. If the State holds title to such lands upon the trusts for public use already indicated, it may be that it has power to release to an individual or a corporation such title as it has, not thereby emancipating the trust estate from the execution of the trust with which it stands charged, but substituting its grantee as the trustee of this trust. Understood in this way the proposition may perhaps be tenable. Such would be the effect of legislation authorizing any other public agency, as the city of Chicago, or perhaps, the railroad company, to

undertake the construction of wharves and docks in aid of navigation, and in execution of the public trust subject to which, title to the land under navigable waters rests in the State. But to say this is far from saying that the State as proprietor, or the Legislature of a State by law in the exercise of plenary legislative power, such as is enjoyed by the Parliament of England, may grant title to the bed of navigable waters. In so far as such grant is made in aid of navigation, as by way of granting flats which are an obstacle to navigation, or of shore privileges, the exercise of which is a positive aid to navigation, the State acts clearly within its duty as trustee for the great public trust attaching to its title.

As a proprietor in the sense in which it is the proprietor of lands, title to which rests in the State for the purpose of sale and disposition, it has no title whatever to the bed of water actually navigable and required for the purposes of navigation. Its interest, while in the case cited it is referred to as proprietary, is essentially sovereign and municipal. It is not the subject of grant but of regulation by law, and disposition by law is not unrestrained as is the case in England, but in so far as attempted, in derogation of the trust for public navigation, is absolutely prohibited by the commerce clause of the Federal Constitution.

The statement, therefore, made on behalf of the railroad company, that the power and prerogative which belonged either to the crown or Parliament, became immediately vested in the State is inaccurate and untenable. The citizens of this republic hold their rights to life, to liberty and to property by no such uncertain tenure as that of mere legislative pleasure. Those essential rights

are absolutely secured by the provisions of organic law, and they can not be impaired at legislative discretion.

Where language seeming to sustain the plenary disposing power of the State over such lands has been used, an examination of the cases in which it was employed will show that in such cases questions were presented touching grants either of the shore or tideway, or of strictly submerged lands or flats, or of land in the nature of relicted land or alluvion, or of land which has been uncovered by the water, and which must necessarily pass into private dominion and ownership.

Probably the history of American jurisprudence will not reveal a case in which an attempt by the State to abdicate its sovereign title to the bed of a great extent of navigable water manifestly required for the purposes of commerce and navigation, has been either made by a legislature or sanctioned by the courts. Treated as a grant by a proprietor, such legislation would be inoperative because the grantor has no such title as he attempts to convey. Treated as an exercise of sovereign legislative power it would be absolutely void as a positive infraction of the federal constitution. No such attempt was made in this case, and no reasonable construction of the legislative act under review will permit counsel justly to tax the Legislature of Illinois with such a wanton abuse of power and gross breach of high and important public trust.

Mr. Justice Catron, in his dissent in *Pollard's Lessee* v. *Hagan*, differed with the court on the ground that the decision founded itself on the right of navigation and ownership of uplands connected therewith, whereas the subject of the grant under consideration in that case was a flat which had no connection with navigation, but was an obstruction to it. His construction of

the opinion of the court illustrates the suggestion that that opinion furnishes no authority whatever for sustaining the power of the State to grant the bed of waters actually navigable and required for the purposes of public navigation.

Certainly within reasonable bounds the State may judge of the requirements and uses of navigation, and when legislation of a State is examined by this court, the ostensible object of which is an execution by the State of the trusts for public navigation on which it holds such lands, this court would undoubtedly be slow to find in such legislation any transgression of the federal constitution.

On the other hand, whenever it shall clearly appear that a State has attempted to grant the bed of one of our great navigable lakes for a mile out from the shore, or for two miles or five miles, as proprietor and to vest title therein in the grantee, as in a quarter section of school or canal land, not in execution of the trust upon which the State holds, but in derogation thereof, and to the absolute destruction of the rights sought to be secured to the public in the waters of the lake, it will be the clear duty of this court to declare it an utter violation of this wise and important provision of our supreme organic law.

The case of *Langdon* v. *New York*, 93 N. Y. 134, cited for the railroad company, while it employs language which might require some qualification if literally understood, decides nothing, except that riparian rights cannot be taken or destroyed by the State without compensation. The language there used as to the right of the State to dispose of land under navigable waters was so applied to grants of land under navigable waters adjacent to the shore, which probably might be called the tideway. On

that subject, Judge FINCH, in a later case, discussing riparian rights in New York harbor, used this language:

"The State may, in virtue of its ownership of the "tideway, destroy them by a use or grant for public pur- "poses, and without compensation. But the State may "respect them if it chooses, and always does so wherever "the public use is consistent with the private right. The "city of New York became substituted for the sovereign "in the ownership of the tideway. The Dongan charter "gave it for commercial purposes and for the public use. "The city took it, as the crown had held it, as trustee for "the public. In time the custom grew up, which recon- "ciled the public use with the private interest, of granting "portions of the tideway to individuals, but still for pub- "lic purposes and as a means for the public good. The "grantees were required to build docks and wharves and "bulkheads, under the municipal control, and so took the "place of the city in executing the public purposes of the "grant. The deed to the present defendants was of that "character. The adoption of this policy made it unneces- "sary to sacrifice the riparian owner, and it was competent "for the city and became its duty to provide a mode of "selling its lands under water which would accomplish the "double purpose. While its right in the soil of the tide- "way was admitted to be absolute, yet it could, as it did, "recognize and protect the easement or privilege of the "riparian owner, wherever such protection was not incon- "sistent with the public interest."

Mayor, etc., N. Y. v. *Hart*, 95 N. Y. 443–457–8.

It will be noted that this learned judge discusses the powers of the State in virtue of its ownership of the tide-

way. Clearly such language is wholly inapplicable to its ownership in the bed of non-tidal waters. The concluding portion of the opinion in this case is a part of the long struggle of the courts of that State to escape from the manifestly untenable and indefensible position taken in the Gould case at a comparatively early period in the history of their jurisprudence; and the final result reached when that case was overruled and entirely abandoned, illustrates the impotence of *stare decisis* to sustain even a rule of property adopted upon full deliberation by a court of last resort when obviously founded upon mistaken notions of the law and contrary to the clear principles of justice.

That and the New Jersey cases to be hereafter considered must be attributed perhaps to an undiscriminating fidelity to the common law which sometimes seems to preclude a broad and comprehensive view of great public questions in the full light of modern and American jurisprudence.

The Supreme Court of Minnesota, in a recent case, considered the general subject under examination, and announced views similar to those here sought to be maintained.

Miller v. *Mendenhall*, 43 Minn. 95.

The same case is also reported in 19 American State Reports, 219, and, at page 226, is appended a learned note.

After commenting upon the effect of legislation in Massachusetts authorizing the owners of wharves to extend them out to the harbor line of Boston, and the decision reached in that State, that such legislative authority was equivalent to a grant of a possessory title, if not an abso-

lute interest in the soil, and on a similar decision in Virginia, the court said :

" But the title of the State is not extinguished by " such legislative action merely. In this country the gen- " erally accepted doctrine is, that the *jus privatum* passes " to the owner of the adjacent lands, and in this State " extends to low-water mark, with the accompanying " riparian rights, while the *jus publicum* belongs to the " State, which holds the title to the soil under the water " as trustee. ' The sovereign is trustee for the public, and " the use of navigable waters is inalienable ' ; Kent's Com. " 427. See *Commonwealth* v. *Alger*, 7 Cush. 53–89–93."

The court recognizes the right of the State to regulate the exercise of riparian rights and to make cessions to private owners of possessory rights in the soil of navigable waters, the effect of which will be to give to them private and exclusive rights equivalent to a grant ; but holds that the public right of navigation and fishery will not be extinguished until the waters are excluded. To the same effect is *Hanford* v. *Ry. Co.*, 44 N. W. Rep. 1,144, decided by the same court.

The case of *Commonwealth* v. *Alger*, referred to, like the New York cases, dealt with the question of the title of the State to the tideway or line between high and low water. The opinion is by Chief Justice Shaw, and is learned and exhaustive. The proceeding was an indictment against the defendant for maintaining a wharf beyond the harbor line in the Boston harbor. The point decided was that the colonial ordinances, the date of which seems to be somewhat uncertain (p. 67), vested the property of the flats in the owner of the upland or fee, but that even this title was subject to the right of the sovereign to

regulate the use of the property in the interests of navigation.

So it was held in a later case——,

Commissioners v. *Holyoke Water Power Co.*, 104 Mass. 446, that a grant of land covered by tidewater does not affect the power of the Legislature to protect the public rights.

In another case,

Boston v. *Richardson*, 105 Mass. 351,

where similar questions were learnedly examined, it was declared if, prior to the ordinance of 1647, it was the law in Massachusetts, as at common law, that a grant from the sovereign of land bounded on tidewater did not pass below high-water mark without express words, that was because the shore under tide water was held by the colonial government, not merely like other lands within its jurisdiction, but as a portion of the public domain in a fiduciary relation and for the public use; and the court recognizes the subjection of a title in flats granted by the sovereign, to the authority of the Legislature, to provide for the protection of harbors, and, in the interest of the public right of navigation, to control the use of property so granted.

All these cases, and many more might be cited, clearly establish that although the State may have in a sense a measure of proprietary right in the bed of navigable waters within its boundaries, that right pertains to sovereignty, and a grant thereof confers no such dominion or ownership upon the grantee as a grant of public lands of the State subject to disposition. Such right is also qualified by the riparian rights of shore owners which do not at all depend upon ownership of the bed of the water.

Such riparian right is a valuable property right which cannot be taken or impaired by the State without compensation. This principle is firmly established in this country by the adjudications of this court and by the great weight of modern authority.

Dutton v. *Strong*, 1 Black, 22.
Railroad Co. v. *Schurmeir*, 7 Wall. 272.
Yates v. *Milwaukee*, 10 Wall. 497.
Weber v. *Harbor Comrs.*, 18 Wall. 57.
St. Louis v. *Rutz*, 138 U. S. 246.
Union Depot Co. v. *Brunswick*, 31 Minn. 297.
Miller v. *Mendenhall*, 43 Minn. 45. (S. C. 19 Am. St. 219).
Burton v. *Richardson*, 105 Mass. 351–361.
Rumsey v. *N. Y. & N. E. R. R.*, 133 N. Y. 79–87–8.

The last case finally and expressly overrules *Gould* v. *H. R. R. R.*, 6 N. Y. 522, and shows that *Stevens* v. *Patterson & Newark R. R.*, 34 N. J. L. 32, was based on the Gould case and an Exchequer decision in *Duke of Buccleuch* v. *Metropolitan Board*, which latter case was reversed in the House of Lords, L. R. 5 E. & I. App. 418. The Gould case was expressly disapproved in *Rigney* v. *Chicago*, 102 Ill. 64.

The decision of this court in *Hoboken* v. *R. R. Co.*, 124 U. S. 656, merely announced in a case touching the title to New Jersey realty the law as declared by the courts of that State.

The question as to the rights of riparian owners is suggested not merely for the purpose of arguing that the city had in its own interest, or in the interest of the owners of lots adjacent to the water front, rights as a

riparian proprietor which could not be divested by the Legislature without compensation, but also to illustrate the proposition that the title of the State to the bed of navigable waters is of such a peculiar character that any attempt to construe legislative grants thereof upon the principles adopted in the construction of grants of the public lands of a State is not permissible; and the act of the Legislature of Illinois, under which the railroad company claims its rights, and to a true construction of which the argument now proceeds, cannot be regarded as a grant of lands in fee to the railroad company, nor be governed by the principles which were applied by this court in the case of

Fletcher v. *Peck*, 6 Cranch, 87,

cited to sustain the contention of the railroad company.

Certainly it has been conceded on behalf of the company that it must enjoy its rights to the lake front subject to the general powers of the State, in the exercise of its sovereignty, to control the use of the lake and harbor in the interest of public navigation, and subject to the constitutional power of Congress in the premises. But with these limitations the contention has been that the State had power to grant, and intended to grant, to the railroad company the title in fee simple to the bed of the lake along the entire lake front, and a mile out into the lake, the grant thus extending to a point beyond where the government breakwaters are now located.

Before proceeding to examine the rights of the company under this act, it may be said that it is not intended by this argument to insist upon the invalidity of that act. Perhaps even though it were to be construed as contended for the company, and so as to show clearly a breach of

high public trust by the State, it may not on that account be attacked in this proceeding.

This court in the swamp land cases did decide rightly where controversies arose between litigants in which it was sought to enforce the trust attaching to those lands by congressional grant to the States, that the trust did not follow the lands nor impose a duty upon the State which private parties could enforce; and it was declared that this was a matter between two sovereign powers and one which private parties could not bring into discussion; that whether the States faithfully performed their trusts or not was a question between the United States and the States.

Emigrant Co. v. *County of Adams*, 100 U. S. 61

Mills Co. v. *Railroad Company*, 107 U. S. 557.

In so far as the State has disregarded the trust upon which it holds its title to the bed of Lake Michigan, it may be that these cases are applicable to any attempt to declare the invalidity of legislation by which this result has been accomplished, so far as the interests of the city are involved. Whether or not in this proceeding the government might rightfully ask for such relief presents a somewhat different question, and one which will not here be discussed.

It may be, too, that in so far as this legislation is in derogation of the private property rights of adjacent owners, this court would not be moved to the vindication of those rights until the aggrieved parties claim its intervention. But if a construction of the act can be fairly reached, consistently with its language, which will relieve

the State from the imputation of a gross betrayal of public trust and a wanton disregard of private property rights, surely that construction will be followed and adopted here.

V.

The Act of 1869 is as follows:

An act in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that all right, title and interest of the State of Illinois in and to so much of fractional section 15, township thirty-nine, range fourteen east of the third principal meridian, in the city of Chicago, county of Cook and State of Illinois, as is situated east of Michigan avenue, and north of Park row, and south of the south line of Monroe street, and west of a line running parallel with and four hundred feet east of the west line of said Michigan avenue, being a strip of land four hundred feet in width, including said avenue, along the shore of Lake Michigan, and partially submerged by the waters of said lake, are hereby granted in fee to the said city of Chicago, with full power and authority to sell and convey all of said tract east of said avenue, leaving said avenue ninety feet in width, in such manner and upon such terms as the common council of said city may by ordinance provide: provided, that no sale or conveyance of said property, or any part thereof, shall be valid, unless the same be approved by a vote of not less than three-fourths of all the aldermen elect.

SEC. 2. The proceeds of the sale of any and all of said lands shall be set aside, and shall constitute a fund, to be designated as the "Park Fund" of the said city of Chicago; and said fund shall be equitably distributed by the common council between the South division, the West division and the North division of the said city, upon the basis of the assessed value of the taxable real estate of each of said divisions, and shall be applied to the purchase and improvement in each of said divisions, or in the vicinity thereof, of a public park or parks, and for no other purpose whatsoever.

SEC. 3. The right of the Illinois Central Railroad Company under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use, and control, in and to the lands, submerged or otherwise, lying east of the said line, running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one south of and near to the round-house and machine shops of said company, in the South Division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns; provided, however, that the fee to said lands shall be held by said company in perpetuity,

and that the said company shall not have power to grant, sell, or convey the fee to the same; and that all gross receipts from use, profits, leases, or otherwise of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter; and provided also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assemby which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor; and provided, further, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now, or which may hereafter be, on the same, which shall hereafter be leased by said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation.

SEC. 4. All the right and title of the State of Illinois in and to the lands, submerged or otherwise, lying north of the south line of Monroe street, and south of the south line of Randolph street, and between the east line of Michigan avenue and the track and roadway of the Illinois Central Railroad Company, and constituting parts of fractional sections ten and fifteen in said township thirty-nine, as aforesaid, are hereby granted in fee to the Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central

Railroad Company, their successors and assigns, for the erection thereon of a passenger depot, and for such other purposes as the business of said company may require; provided, that upon all gross receipts of the Illinois Central Railroad Company, from leases of its interest in said grounds, or improvements thereon, or other uses of the same, the per centum provided for in the charter of said company shall forever be paid in conformity with the requirements of said charter.

SEC. 5. In consideration of the grant to the said Illinois Central, Chicago, Burlington and Quincy, and Michigan Central Railroad Companies of this land as aforesaid, said companies are hereby required to pay to said city of Chicago the sum of eight hundred thousand dollars, to be paid in the following manner, viz.: Two hundred thousand dollars within three months from and after the passage of this act; two hundred thousand dollars within six months from and after the passage of this act; two hundred thousand dollars within nine months from and after the passage of this act; two hundred thousand dollars within twelve months from and after the passage of this act; which said sums shall be placed in the Park fund of the said city of Chicago, and shall be distributed in like manner as is hereinbefore provided for the distribution of the other funds which may be obtained by said city from the sale of the lands conveyed to it by this act.

SEC. 6. The common council of the said city of Chicago is hereby authorized and empowered to quit-claim and release to the said Illinois Central Railroad Company, the Chicago, Burlington & Quincy Railroad Company and the Michigan Central Railroad Company any and all claim and interest in and upon any and all of said land

north of the south line of Monroe street, as aforesaid, which the said city may have by virtue of any expenditures and improvement thereon or otherwise; and in case the said common council shall neglect or refuse thus to quit-claim and release to the said companies, as aforesaid, within four months from and after the passage of this act, then the said companies shall be discharged from all obligation to pay the balance remaining unpaid to said city.

SEC. 7. The grants to the Illinois Central Railroad Company contained in this act are hereby declared to be upon the express condition that said Illinois Central Railroad Company shall perpetually pay into the treasury of the State of Illinois the per centum on the gross or total proceeds, receipts, or income derived from said road and branches stipulated in its charter, and also the per centum on the gross receipts of said company reserved in this act.

SEC. 8. This act shall be a public act, and in force from and after its passage.

Passed, over veto, 16th April, 1869.

The view taken, as to the construction of this act by the court below, is clearly expressed in the opinion:

"The act was passed before the General Govern-
"ment had, in the interest of commerce, adopted any
"plan for an outer harbor at the city of Chicago; and
"we agree with one of the learned counsel of the rail-
"road company when he says that, looking at the terms
"of the grant, the nature and situation of the land
"granted, and all the attendant circumstances of which
"the court may properly take cognizance, it is mani-
"fest that the intention of the Legislature was to enable
"that company, in the interest of commerce, and there-
"fore for public purposes, to construct an outer harbor

"at Chicago, and to invest it with power to build, "maintain and lease wharves and docks for the use of "shipping. The ownership of the soil under the lake "would have been of no practical value to the railroad "company for any purpose except those just stated. A "trust was engrafted upon the fee in the submerged "lands for the benefit of the public and not for the "aggrandizement of the railroad company. This inter- "pretation of the act is fortified by the prohibition upon "the company's granting, selling or conveying the fee— "a restriction upon its power of dealing with these lands "inconsistent with an absolute title thereto. It is fur- "ther sustained by the declaration that nothing in the "act should authorize obstructions to the harbor or the "impairment of the public right of navigation and by "the reservation of the right of the General Assembly "to regulate the rates of wharfage and dockage to be "charged in said harbor. In short, the Legislature in- "tended, by the act of 1869, to secure such improve- "ment of the harbor of Chicago as was demanded "by the large commerce of the lake, and to that end "proposed to place certain resources of the State at "the command of the railroad company as an agency of the "State, with such an enlargement of its powers and privi- "leges as would enable it to accomplish the public objects "in view." (*Trans. 215–216.*)

The view of learned counsel for the railroad as already suggested and illustrated, is, however, notwithstanding the lapse adverted to by the Circuit Court, that, as stated in one of the briefs filed by its learned special counsel below, the State can sell the bed of Lake Michigan and dispose of it, just as it might, in the case of removal of the seat of State government, sell the capitol building

and grounds at Springfield; and that this act is an exercise of that disposing power; and the learned special counsel also argued that the title of the railroad company was as unimpeachable as that which the purchasers of swamp land acquired from the State. At the same time, while insisting upon the rights of the railroad company as grantee under this act, counsel seem to be careful to limit their claims as to the use to which the company may put the property so acquired.

It is thought that the view taken by the Circuit Court is fully justified by the language of the act, and is the only construction of its force and effect which, under the principles and authorities already considered, and the general principles governing the construction of grants of this character, is admissible. If it should be technically considered that the State, as the owner in fee of the bed of the lake, might cast its legal title upon the railroad company, the latter would take it subject to such limitations as attach to it in the hands of the State; and further subject to the general legislative control of the sovereign. If it should be considered that by this act legal title passed to the bed of Lake Michigan, it must also be held that the company took title subject to the regulations as to the use and enjoyment of the property prescribed in that act.

As has already been seen, the right to wharf carries with it, by necessary implication a right to the soil under water, so far as that may be needed for support of authorized constructions. The fair interpretation of this act is that by it the right to the soil under the waters of Lake Michigan was granted to the railroad company *sub modo*—to the extent only that the enjoyment of such a right was necessary to the exercise of the powers contemplated

by the act. It has been studiously maintained, both by the learned general and special counsel for the road, that this grant was made for purposes of a public character; that it was made in the interest of commerce and navigation, and that it was intended to subserve the interest of those engaged in navigation and shipping, and as the only feasible mode by which additional commercial facilities could be secured in the navigable waters adjacent to the city of Chicago; and it has been stated if with this object in view the grant had been made to the city no one would have thought of questioning its validity. That grant was made to the city by the dedication of this public water front and the action of the Legislature in conferring authority upon the city to dock and wharf. That carried with it, as has been already shown, whatever right in the water and soil beneath it was necessary to the full enjoyment of the granted privileges by the municipality. The whole case of the railroad company rests upon the right of the Legislature to withdraw this grant of wharfing privileges and attendant interest in the bed of the lake from the city of Chicago, as a mere public municipal agency and to make a similar grant to the railroad company. No argument can be suggested which demonstrates the irrepealable character of the rights and privileges conferred upon the railroad company which is not equally applicable to the grant made to the city. It is not true that the State intended to grant to the railroad company the bed of the lake for the general public purposes of the railroad, and this has never been claimed by its counsel. Such grants have been frequently made by the nation and the State of public lands over which the granting sovereignty had full power and dominion, and in

which it had a proprietary interest, very different from that which it holds in the bed of navigable waters.

When such grants are made the lands granted are and are generally expected to be sold by the railroad company. In this case the company was expressly prohibited from selling the bed of the lake. If the city, in the exercise of its charter powers, had built wharves and docks at large expense and thus acquired the right of private property in these structures, and in the soil upon which they rested, certainly those property interests could not be destroyed by subsequent legislative action, except upon compensation. This principle was fully recognized by the court below, and the railroad company protected to the fullest extent in such property rights as it had acquired by filling and other work, on the faith of the act of 1869 and prior to the passage of the repealing act of 1873.

The grant made by the State to the railroad company was wholly gratuitous. It is not to be presumed that the State would confer property rights of incalculable value upon this corporation as an absolute gratuity and without the expectation of some public benefit to accrue. Not that of the remote and indirect, not to say doubtful, advantage which might arise from the increased prosperity of this great railroad, but a direct and immediate benefit to the great public interest, as to which the State stood, in respect of this property, in the capacity of trustee; and this has been justly observed upon by the learned counsel for the railroad. In other words the same considerations of regard to the public welfare and the necessities of public commerce which moved the Legislature to confer these charter powers as to wharves and docks upon the municipality might well be presumed to have induced the bestowal of the same privileges upon the railroad to

be held upon like tenure. And when, in the exercise of legislative discretion, it appears that those public purposes, regard for which suggested the gift of these powers to the railroad company, might be better served by their withdrawal, it was clearly competent for the Legislature, having due regard for such property rights as had attached to the subject of their gift in the interval, to resume the subject of its license and to permit the city to control these essentially public and municipal franchises.

Neither the provisions of the fourteenth amendment, nor that clause in the federal constitution which forbids a State from passing a law to impair the obligation of contracts in anywise affects this exercise of legislative discretion. There was no grant or gift of property as such. There was no contract entered into with the corporation, for the act of 1869 was not a corporate charter. It merely granted a permissive privilege during sovereign pleasure, *dum bene placet*, to the railroad company, which, if availed of and acted upon might have operated, in connection with filling, docking and other expenditures, to have conferred vested property rights upon the railroad company which would have been regarded, and which, to the extent that they existed, were actually regarded and carefully protected in the court below.

It is perfectly legitimate for counsel representing the city in this case, if the language of the act under consideration be at all doubtful, to rely on the presumption that the State did not intend "to fence in its metropolis." It is perfectly proper to argue that the Legislature did not intend to confer upon the company—which, while a quasi public corporation, is yet owned and managed by individuals as a profitable and remunerative financial enterprise, pecuniary profits from which go to its stockholders—abso-

lute power and dominion over the teeming commerce of this imperial city. It is entirely admissible to suggest that the principle uniformly adopted in the construction of legislation of this character—that nothing passes by implication from the sovereign, that nothing must be assumed as against the State—should not be departed from, but rather adhered to with intelligent firmness and scrupulous fidelity.

It does not seem necessary to divert the course of argument in the consideration of the proposition suggested by the railroad company, that the provision in the charter of the company requiring it to pay a percentage of its gross returns to the State, made applicable to revenues derived from the exercise of the privileges conferred by this act, and made irrepealable by the constitution of Illinois in 1870, has any bearing whatever upon this question. This point of counsel is so completely and satisfactorily answered in the opinion of the court below, it will be left, so far as this argument goes, without further discussion. (*Trans. 215.*)

The rule for the construction of gratuitous grants made by the sovereign, at the solicitation of the grantee, is fully considered in the case of

Langdon v. *Mayor, etc.*, 93 N. Y. 129, 145–6–7, already cited.

In that case the court observed:

" That rule of construction has been applied to gra-
" tuitous grants made by the sovereign, of property, fran-
" chises and privileges, upon the solicitation of grantees,
" and such were the grants in all the cases cited in the ap-
" pellant's brief. But so far as I have discovered, this rule
" has never been applied, certainly not in its full extent, to

" grants made for the benefit of the sovereign, upon ade-
" quate valuable consideration paid to the sovereign for the
" thing granted. In 2 Blackstone's Commentaries, it is said:
" 'A grant made by the king at the suit of the grantee,
" shall be taken most beneficially for the king and against
" the party; whereas the grant of a subject is construed most
" strongly against the grantor. Wherefore it is usual to
" insert in the king's grants that they are made, not at the
" suit of the grantee, but *ex speciali gratia, certi, scientia,*
" *et mero motu regis;* and then they have a more liberal
" construction.' The reason generally given for the rule
" is that in a grant proceeding from the application of the
" subject, the grantee ought to know what he asks, and if
" that does not appear, nothing shall pass from the
" king by reason of the uncertainty. In *Charles*
" *River Bridge* v. *Warren Bridge* (7 Pick. 344,
" 462), MARTIN, J., speaking of public grants, said:
" 'Although no distinct thing or right will pass by
" implication, yet I do not mean to question
" that the words used should be construed in their most
" natural and obvious sense, and that whatever is essen-
" tial to the enjoyment of the thing granted will be neces-
" sarily implied in the grant.' Again: 'The authority
" to build the bridge is granted by implication. But it is
" a necessary implication. Without it the grant itself
" would be an absurdity and nullity.' In the same case,
" WILDE, J., said that in doubtful cases it seemed to him 'a
" sound and wholesome rule of construction to interpret
" public grants most favorably to the public interest, and
" that they are not to be enlarged by doubtful impli-
" cation;' but he said: 'There are some legislative
" grants, no doubt, that may admit a different rule of con-
" struction, such as grants of land on valuable consider-

" ation and the like. It is that when the king's " grants are upon a valuable consideration they shall be " construed favorably to the patentee for the honor of the " king. (Bac. Abr. Prerog. F. 2.)' In the same case, " in the United States Supreme Court (reported in 11 " Peters, 420), TANEY, C. J., approved the general rule " above referred to for the construction of public grants, " and at page 549, speaking of the charter there under " consideration, said : 'In charters of this description no " rights are taken from the public, or given to the corpo- " ration, beyond those which the words of the charter, by " their natural and proper construction, purport to convey. " There are no words which import such a contract as the " plaintiffs in error contend for.' At page 557 MC- " LEAN, J., said : 'In ordinary cases a grant is con- " strued favorably to the grantee and against the " grantor. But it is contended that in govermental " grants nothing is taken by implication. The broad rule " thus laid down cannot be sustained by authority. If an " office be granted by name, all the immunities of that " office are taken by implication. Whatever is essential " to the enjoyment of the thing granted must be taken by " implication. And this rule holds good whether the " grant emanates from the royal prerogative of the king of " England, or under an act of legislation in this country. " The general rule is that a grant of the king at the suit of " the grantee is to be construed most beneficially for the " king, and most strictly against the grantee ; but grants " obtained as matter of special favor of the king, or on " consideration, are more liberally construed ;' and to the " same effect are the observations of Story, J., at page " 589, where he says the rule never did apply to grants " made by the sovereign for a valuable consideration. In

" 3 Washburn on Real Property (3d ed.), 172, the learned " author says: 'This strictness of construction in favor " of the sovereign and against the subject applies only in " cases where there is a real uncertainty or ambiguity in " the terms of the grant. Nor, as it seems, is the rule " applicable where the grant is for a valuable considera- " tion.'"

The same rule was announced by this court at a comparatively early period of its existence,

Charles River Bridge v. *Warren Bridge*, 11 Peters, 420, cited in the New York case.

This fully appears in that case where the authorities in this court, up to that date, are fully examined and stated, and Mr. Chief Justice TANEY, in delivering his opinion, touching the construction of charters, which are not in the strictest sense gratuitous grants, employed this language:

" Much has been said in the argument of the princi- " ples of construction by which this law is to be expounded, " and what undertakings, on the part of the State, may be " implied. The court think there can be no serious diffi- " culty on that head. It is the grant of certain franchises " by the public to a private corporation, and in a matter " where the public interest is concerned. The rule of " construction in such cases is well settled, both in England " and by the decisions of our own tribunals. In 2 Barn. " & Adol. 793, in the case of the proprietors of the *Stour-* " *bridge Canal* v. *Wheeley*, and others, the court say: " 'The canal having been made under an act of Parliament, " the rights of the plaintiffs are derived entirely from that " act. This, like many other cases, is a bargain between a " company of adventurers and the public, the terms of

" which are expressed in the statute, and the rule of con-
" struction in all such cases is now fully established to be
" this: That any ambiguity in the terms of the contract
" must operate against the adventurers and in favor of the
" public, and the plaintiffs can claim nothing that is not
" clearly given them by the act.' And the doctrine thus
" laid down is abundantly sustained by the authorities
" referred to in this decision. The case itself was as
" strong a one as could well be imagined for giving to the
" canal company, by implication, a right to the tolls they
" demanded. Their canal had been used by the defend-
" ants to a very considerable extent, in transporting
" large quantities of coal. The rights of all persons to
" navigate the canal were expressly secured by the act of
" Parliament, so that the company could not prevent them
" from using it, and the toll demanded was admitted to be
" reasonable. Yet, as they only used one of the levels of
" the canal, and did not pass through the locks, and the
" statute, in giving the right to exact toll, had given it for
" articles which passed through any one or more of the
" locks, and had said nothing as to toll for navigating one
" of the levels, the court held that the right to demand
" toll, in the latter case, could not be implied, and that the
" company were not entitled to recover it. This was a
" fair case for an equitable construction of the act of
" incorporation, and for an implied grant; if such a rule
" of construction could ever be permitted in a law of that
" description. For the canal had been made at the
" expense of the company; the defendants had availed
" themselves of the fruits of their labors, and used the
" canal freely and extensively for their own profit. Still,
" the right to exact toll could not be implied, be-
" cause such a privilege was not found in the charter.

"Borrowing, as we have done, our system of juris-
"prudence from the English law, and having adopted,
"in every other case, civil and criminal, its rules for
"the construction of statutes, is there anything in our
"local situation, or in the nature of our political institu-
"tions, which should lead us to depart from the principle
"where corporations are concerned? Are we to apply to
"acts of incorporation a rule of construction differing
"from that of the English law, and, by implication, make
"the terms of a charter in one of the States, more unfav-
"orable to the public, than upon an act of Parliament,
"framed in the same words, would be sanctioned in an
"English court? Can any good reason be assigned for
"excepting this particular class of cases from the opera-
"tion of the general principle; and for introducing a new
"and adverse rule of construction in favor of corporations,
"while we adopt and adhere to the rules of construction
"known to the English common law, in every other case,
"without exception? We think not; and it would present
"a singular spectacle, if, while the courts in England are
"restraining, within the strictest limits, the spirit of mo-
"nopoly, and exclusive privileges in the nature of monop-
"olies, and confining corporations to the privileges plainly
"given to them in their charter; the courts of this coun-
"try should be found enlarging these privileges by impli-
"cation; and construing a statute more unfavorably to the
"public, and to the rights of the community, than would
"be done in a like case in an English court of justice."

The same rule of construction as to gratuitous grants of privileges by the State is announced in

Tucker v. *Ferguson*, 22 Wall. 527.
Fertilizing Co. v. *Hyde Park*, 97 U. S. 657.
Newton v. *Commissioners*, 100 U. S. 548–561.
Commissioners v. *Holyoke Water Power Co.*, 104 Mass. 446–449.

Hale, in his great treatise, *De Jure Maris*, after stating that the propriety of the soil of a port may be in the king and the franchise in another, although in ordinary usage and presumption they go together, nevertheless says :

" If the king at this day grant *portum maris de S.*, " the king having the port in point of interest as well as " in point of franchise, it may be doubtful whether, at " this day, it carries the soil, or only the franchise, because " it is not to be taken by implication."

Hargrave, 33 : The contrary presumption is founded as he clearly shows, on possession and prescription.

It cannot be permissible, in view of these familiar canons, applicable to legislative grants without consideration, entered into merely for the benefit of the grantee, to construe this act as contended for by the railroad company. The State did not attempt to convey the fee to the bed of the lake in derogation of the public right of navigation. The language of the act expressly excludes this idea. By it the railroad takes no title whatever to the bed of the lake as by grant of lands. To so hold would be to convict the State of a breach of public duty and public trust. The act did not create in the railroad company rights of private property in derogation of the public right. It granted to the company powers to be exercised, subject

to the public right, in execution of the trust reposed in the State in the interest of public navigation and in aid of the purposes to which this water front was originally dedicated by the State. It did not attempt to destroy or pervert the public use attaching to this property by the dedication. It did not attempt to impair the private property right of owners of adjacent lots purchased, as appears by legitimate inference and positive testimony, on the faith of this dedication to a specific purpose. Whether, had such an attempt been made, its validity could have been sustained, is a question which, happily, it is not necessary for this court to consider.

As a proprietor the State had no such title to convey. Its sovereign or legislative right to convey the bed of water actually navigable is clearly limited by the clause in the constitution conferring upon Congress the power to regulate commerce. Subject to this clause its plenary power to grant the bed of the lake adjacent to the shore in aid of commerce and navigation must be conceded, subject also, however, to the right of the State, by subsequent legislation, to regulate and control the use to which property so bestowed might be put by the grantee.

The very fact that the State made so liberal a grant extending out a mile into navigable water, having an average depth sufficient to float vessels such as commonly entered the port of Chicago, indicates that this was an attempt by the State, as has thus far been, to some extent, conceded by the railroad company and its representatives, not to appropriate this splendid harbor to the general purposes of the railroad company, but to aid in its development in the interest of public commerce and navigation, and, vicariously, to clothe the railroad company with the

powers which the State itself might exercise or might confer upon any other suitable public agency.

This being the character of this grant the railroad company being substituted as a municipal or local agent to execute the sovereign powers of the State, for the general welfare and in the public interest, it is demonstrable that such a grant confers no private property interest, although it operate to put the beneficiary thereof in a position to acquire such right as to any property created under the authority thus granted.

To the exercise of these public powers thus granted, a qualified interest in the soil of the lake might be regarded as essential. It seems, however, to be rather a technical and narrow question whether a grant of wharfing privileges necessarily implies a grant of title to the bed of the water in so far as the use thereof is necessary for the purpose of supporting structures authorized by the grant. Certainly the right to the use of the bed of such waters must pass by necessary implication. Such a right to soil would, of necessity, follow after the grant had been acted on, so that the right of private property attached, and this act ought, in favor of the public, to be construed as conferring upon the railroad company in substance merely such right of user in aid of the public purposes sought to be accomplished. Had the grant been merely of a few hundred feet additional width of ground for track room and general railroad purposes, it might be argued, that this was granted to be filled by the railroad company and employed for its own convenience and advantage strictly, and that seems to be the only use which, up to the time of the repealing act of 1873, the railroad exhibited any disposition to make of the property claimed under this grant.

If it be suggested that the evils of a contrary construction of this act will be controlled and prevented by the fact that a harbor line has already been established by the general government, beyond which the railroads cannot encroach, and that the exercise of its rights in the harbor are subject to further legislative control, both by the State and federal government, it is to be suggested that this may mitigate the evil, but does not prevent the disastrous consequences involved in turning over the complete control of this shore and harbor to the railroad company, subject to these possible restraints, but with no power lodged anywhere either to compel the company to improve it or to provide for such improvement by any other agency.

The control of that water front naturally and properly belongs to the city of Chicago. If this attempt by the railroad to grasp and hold it shall succeed, the State will have literally "fenced in" its metropolis, and, by persistent and steady encroachments upon the bed of the lake, good reasons will probably be found, from the physical condition and topography of the harbor, requiring a change in the harbor line. That is always the case where the demands of trade and commerce and public navigation increase.

By this act it will be noticed that no obligation whatever is imposed upon the railroad company to improve the harbor. Its acceptance of a grant, which its learned counsel argues may be sustained as a gift, imposes no obligation whatever upon it to utilize and avail itself of the privileges thereby conferred.

The learned special counsel for the railroad took care in the court below to demonstrate what he was pleased to term: "The absurdity of the claim that the city of Chi-

" cago is charged with the duty and obligation to provide " harbor accommodations," etc., citing, to support this proposition,

Goodrich v. *City of Chicago*, 20 Ill. 445.

In that case it was decided that charter authority to the city to remove obstructions and widen and deepen etc., the Chicago River and its branches to their sources, and to extend the harbor one mile into Lake Michigan, did not create any obligation on the part of the city to do those acts. If this principle were to be applied in this case, and no reason is perceived why it is not applicable, it would appear to be very clear that the railroad company was under no obligation whatever to avail itself of the powers conferred upon it as a public agency in substitution for the municipality.

The effect therefore of holding that the legislative grant of those powers is irrevocable, would be to leave the improvement and construction of an outer harbor for the teeming commerce of this great western metropolis wholly in the discretion and good intentions of the railroad company, a result involving such a total and wanton disregard of the public interests as ought not to be imputed to the Legislature, unless required by language most plainly and unmistakably expressive of the clearest legislative purpose to accomplish this great wrong.

All that has been said, and all that may here be repeated, by the learned counsel for the railroad company in criticism of official misconduct and betrayal of public trust, in the conduct of great public works by large municipalities, is wholly aside from the question. If it were material indeed, upon a discussion of such considerations, it might perhaps appear that such official dereliction as

occurs, is often largely due to the influence brought to bear upon the official conduct of public servants by those great and menacing aggregations of money and intellect, whose gigantic operations and growing power suggest serious reflections to the thoughtful student of popular government. If the question were material, it might not be impossible to show that the public have suffered quite as much at the hands of private corporations as by the agents of public municipal bodies; and it can not be so readily assumed as it is by the learned counsel for the railroad, that the public interests of the great city which here sues for justice, are altogether misrepresented by her chosen servants; nor that they would be more carefully guarded and protected if remitted wholly to the intelligent, watchful and disinterested care of the great and powerful organization which learned counsel so ably and loyally represent.

If it should be conceded that this act were to be taken as a grant of the fee in the bed of the lake, still its use would be subject to legislative control; and the railroad company could not build docks thereon against legislative prohibition. Had that right been exercised prior to the repealing act it might well be that the land created by filling in, and the buildings erected, would be the subject of private property, and the rights of the railroad company therein would be vested, and could not by repeal be destroyed; but, except to this extent, the bed of the lake would be subject to legislative control whether the fee rested in the railroad company, in the city, or in individual ownership; and by the repeal of the act conferring the power to wharf upon the railroad company, its right to do so is wholly gone, first, because, this was a legitimate exercise of legislative control over the bed of

the lake, whoever holds title thereto; and second, because it was a repeal of powers conferred upon the railroad company in excess of its charter powers, which the State might rightfully resume, and which gone, the railroad company lacks corporate capacity to take and deal with the subject of the grant.

In a recent New York case the Court of Appeals considered the effect of the ownership in fee of the tideway, or land between high-water mark and four hundred feet below low-water mark in the city of New York as acquired through the Dongan and Montgomerie charters from the crown of England.

The court observed, through Chief Judge RUGER:

"The extent of the interest and authority of the city "over such lands has been the subject of much contro- "versy, and diverse views have been expressed thereon by "various judges from the earliest times. It has been some- "times said that the ownership of the fee in such lands "gave the city, as matter of legal right, authority to "erect and build such structures thereon as they saw fit to "make. We are inclined to think that this proposition to "its full extent cannot be maintained. The right of con- "trol over the navigable waters of the State is a legisla- "tive power, and cannot be destroyed by any authority "whatever. The right of the people to use the natural "public highways of the State is *jus publica*, and cannot "be taken away or seriously impaired by any legislation "whatever (*Smith* v. *City of Rochester*, 92 N. Y., 477; *Led-* "*yard* v. *Ten Eyck*, 36 Barb. 102). The power of regulat- "ing, controlling and improving such waters in the inter- "est of commerce undoubtedly exists. The right, there- "fore, of the city to erect structures in the navigable waters "of the State must necessarily remain subject to the sover-

" eign authority over such highways. These propositions " are quite apparent from the course of legislation on the " subject."

Bedlow v. *N. Y. Floating Dock Co.*, 112 N. Y. 263, 273–4.

This case distinctly ruled that although the city owned in fee the bed of the navigable waters around it, its right to build any structures thereon whatever, was necessarily subject to the legislative authority; and that that legislative right could not be taken away or impaired by any legislation.

Obviously that principle should be applied to the construction of this act, as it expressly reserved, in substance, this right of legislative control. But upon considerations already suggested, it is plain that the railroad company did not take technically or substantially the fee to the bed of Lake Michigan within the lines claimed. The grant was merely of use and not of title.

The company was prohibited from selling or obstructing the harbor, or impairing the public right of navigation. Its rights to wharf and dock and to lease were expressly recognized. The only use authorized of the bed of the lake was such as was not inconsistent with the preservation of the harbor and the rights of public navigation. The inference is natural, reasonable and necessary, that this grant was made in aid of these public interests. It should be so construed, and the company should be held to take such interest only as is necessary to enable it to avail itself of the rights conferred.

But it is said, that where a condition is attached to a grant, repugnant to its terms, the grant stands and the condition falls; and that the conditions attached to the

grant of the bed of the lake are within this category, and must be disregarded. With great deference for the learned counsel who has so argued, it seems to be a proposition too plain for discussion that this is a rule of construction applicable only to private deeds, and wholly unknown in the construction of legislative grants. In the interpretation of such legislation the fair meaning of all the language employed must be regarded, and, contrary to the rule as to private grants, they must be construed most favorably to the grantor. It is submitted that the court below fairly and correctly construed this act in the light of the true principles applicable to gratuitous legislative grants.

VI.

The constitutional questions involved in this case arise on a consideration of the validity and effect of the repealing act of April 15, 1873. That act is as follows:

"An act to repeal an act, entitled 'An act in relation "to a portion of the submerged lands and lake park "grounds, lying on and adjacent to the shore of Lake "Michigan, on the eastern frontage of the city of Chicago,' "in force April 16, 1869.

"Section 1. Be it enacted by the people of the State "of Illinois, represented in the General Assembly. That "the act, entitled 'An act in relation to a portion of the "submerged lands and lake park grounds, lying on and "adjacent to the shore of Lake Michigan, on the eastern "frontage of the city of Chicago,' in force April 16, 1869, "be and the same is hereby repealed." (*Trans. 619.*)

It is understood that the validity of this act is challenged, first, in that it deprives the railroad company of property without due process of law, contrary to sec-

tion 2, article 2, of the constitution of Illinois, which provides that no person shall be deprived of life, liberty or property, without due process of law, and also that it is an infraction of the fourteenth amendment to the federal constitution, which provides that " no State shall make or " enforce any law which shall abridge the privileges or im- " munities of citizens of the United States ; nor shall any " State deprive any person of life, liberty or property " without due process of law, nor deny to any person " within its jurisdiction the equal protection of the laws." And, second, that this act impairs the obligation of the contract entered into between the State and the railroad company by the act of 1869, and its acceptance, and is, therefore, an infraction of section 10, article 1, of the federal constitution, which provides that no State shall pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts.

Enough has been said, perhaps, to show that the railroad company had no property rights under the act of 1869, except in so far as it acted thereunder and filled in the waters of Lake Michigan, and built wharves and other erections thereon in accordance with the permission therein contained. To the extent that its property rights actually attached, it was fully protected by the decree of the Circuit Court.

A case not wholly dissimilar in this respect arose in Massachusetts.

Attorney-General v. *Boston & Lowell R. R.*, 118 Mass. 345.

The railroad company had as annexed to the upland under the colonial ordinance of 1647, a track on flats in Miller River near its conjunction with Charles River, and

had some legislative authority to fill and improve these flats, but before it had completed these improvements, the State interfered, by the Attorney-General, at the instance of the Harbor Commissioners, the latter officers having been created by a statute in 1866. The railroad company defended on two grounds—first, under the statutory authority referred to; second, because it claimed that it began its work before the passage of the act establishing the board of Harbor Commissioners; but the court overruled these defenses, employing the following language, which is quite applicable to the case in hand:

"When this information was filed, the extent of the "flats which the defendant intended to fill up and build "upon had not been defined by any legislative act, or by "any line of wall or piles, but rested wholly in the knowl- "edge and purposes of the defendant and its agents, and "the case shows that the tide water ebbed and flowed "with no obstruction except by a wall built along one "side and about a fourth part of the front of the flats and "then turning and running back a short distance toward "the upland, and there stopping, so that at the time of "the filing of this information there was nothing to indi- "cate the further direction of the sea wall, or whether it "was to run across the flats toward Austin street or back "to the upland, except so far as its course might be con- "jectured from the fact that piles had begun to be driven "(to what extent does not appear) for a continuation of "the proposed line now in question. It can now be "deemed to have been the intention of the Legislature "that an undisclosed purpose, or even a plan upon paper, "of work intended to be done, should be deemed a "beginning of work, within the meaning of the St. of "1866, c. 149, p. 5, and exempt the owner from the super-

" vision of the harbor commissioners. It follows that the " defendant, not having obtained the approval by the " harbor commissioners of the proposed work, is subject " to injunction."

In the cases involving the constitutionality of the legislation of Kansas prohibitory of the sale and manufacture of intoxicating liquors within its borders, this court declared—citing, with approval, *Barbour* v. *Connolly*, 113 U. S. 27—that the fourteenth amendment was not designed to interfere with the power of the State to prescribe regulations to promote the health, peace, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity, and in this case it was accordingly held that those persons who owned buildings and property erected and acquired for the purpose of manufacturing intoxicating liquors when by the law of Kansas that was a lawful occupation, were not deprived of that property within the meaning of the fourteenth amendment by the legislation referred to, prohibiting its use for the purpose for which it had been acquired.

Mugler v. *Kansas*.
Same v. Same.
Kansas v. *Ziebold*, 123 U. S. 623.

The principle of these cases, if applied to the case in hand, would go much further than is necessary to sustain the decree below. It would appear on the principles laid down in this case that if the railroad company had actually filled in the bed of the lake and erected wharves and docks on the land so made, if the State Legislature in the exercise of its powers to control the use of the public waters of the State, should deem it neceesary to again

permit the water of the lake to flow where these structures had been erected by the railroad company, it might so direct without providing for compensation to the railroad company. Whether this would be a logical and legitimate application of the doctrine of the Kansas cases, however, it is not necessary here to inquire, so far as the claims of the railroad company are concerned. It is sufficient to say that under the clear proof in this case no rights of property whatever attached in favor of the railroad company to any part of the bed of the lake south of Randolph street and north of Park row, except the triangular lots south of Randolph street referred to in the opinion of the court and by the decree awarded to the railroad company.

VII.

It is not thought that the act of 1869, assuming that it is not to be treated as a grant of land, and its acceptance by the railroad company created a contract between the State and the railroad company which could not be impaired by subsequent legislation. As is well stated in the opinion, the structures erected after the passage of the act of 1869 and before its repeal, between Chicago River and Randolph street, and those south of Park row were erected either under the charter powers of the company or substantially with the consent of the city, or in the exercise by the railroad of its riparian rights.

(*Trans.* 217, and also 300 *et seq.*, where the deeds showing title in the railroad company are collected.)

(See also *Trans.* 631–633, where the ordinance of Sept. 10, 1855, and Sept. 15, 1856, are given, conferring certain rights on the railroad company as to the approaches to its passenger depot.)

The doctrine of the Dartmouth College case, where it was first announced by this court that a charter of a private corporation was a contract between the State and the corporation, is so firmly embedded in our federal jurisprudence, that criticism upon it may seem to be impertinent. Possibly it does involve the idea that the sovereign may part irrevocably to some extent with sovereign power, having regard to the principle that corporate property is not divested by a repeal of a charter, and that the mere effect of such repeal is to terminate the life of the corporation, leaving its property to be administered upon and disposed of for the benefit of the corporators, and that this power to exercise corporate functions emanates by law from the State. Certainly the affirmative of this proposition may be sustained by a plausible course of reasoning. On the other hand it is true that this decision may be regarded as the recognition and establishment of a principle peculiarly necessary in the developments of modern American enterprise, to the secure enjoyment of the right of pri.ate property.

Whatever view may be taken of this interesting and important question in the abstract, concededly the principle of that case is not to be extended; and strictly followed, as applied to the case before the court, it affords no color to the claims of the railroad company.

It was distinctly laid down by Mr. Justice Story in his concurring opinion in that case, which was marked by great learning and research, that a contract could not be regarded as existing within the contemplation of this clause of the constitution, unless there were a valuable consideration to sustain it.

Dartmouth College v. *Woodward*, 4 Wheat. 518–683.

That principle has since been consistently applied by this court, and accordingly it has been held that while a grant of corporate franchises by a charter accepted by the corporation will be regarded as a contract, subsequent legislation conferring added powers or privileges on an existing corporation will be treated as lacking one of the essential elements of a contract, and, therefore, revocable by the State at pleasure.

The act under examination did not purport to be an amendment to the charter of the railroad company granting the use of public property to the railroad. It was, however, probably rightfully construed to grant by necessary implication corporate power in the corporation to avail of legislative permission.

As has been already seen it was passed upon no consideration whatever, the railroad company not being required by its terms to avail itself of the privileges conferred, and in its acceptance (*Trans. 637*), being careful to enter into no engagements whatever.

Its acceptance is as follows:

"At a meeting of the board of directors of the Illinois "Central Railroad Company held at the company's office "in New York, the sixth day of July, 1870, the following "resolution (*inter alia*) was passed:

"*Resolved*, That this company accepts the grants "under the act of the Legislature of Illinois at its last "session, and that the president give notice thereof to the "State, and that the company has commenced work upon "the shore of the lake at Chicago under the grants "referred to.

CHICAGO, November 17, 1870.

" *Hon. Edward Rummel, secretary of the State of* " *Illinois, Springfield, Ill.:*

" SIR—At a meeting of the board of directors of the " Illinois Central Railroad Company, held at the company's " office in New York, the sixth day of July, 1870, it was " resolved:

" That this company accepts the grants under the act " of the Legislature of Illinois at its last session, and that " the president give notice thereof to the State, and that " the company has commenced work upon the shore of " the lake at Chicago under the grants referred to.

" In accordance with the above resolution I hereby " give you notice that this company accepts the grants " above referred to and more particularly mentioned and " described in an act in force April 16th, A. D. 1869, and " entitled 'An act in relation to a portion of the sub- " merged lands and lake park grounds lying on and adjacent " to the shore of Lake Michigan, on the eastern frontage " of the city of Chicago.'

" And I also give you notice that this company has " commenced work on the improvement of said lake shore.

" You will please regard the above as an acceptance " by this company of the above-mentioned law, and it is " desired by said company that said acceptance shall re- " main permanently on file and of record in your office.

" Please acknowledge receipt hereof and oblige,

" Yours very truly,

" JOHN M. DOUGLAS,

" President."

The cession by the State to the company was therefore purely voluntary, and so far as this clause of the federal constitution is concerned, at least, is entirely revocable. Whether in so far as land has been made by the railroad company and wharves and docks erected, it should then be considered as to them a contract protected by the federal constitution, or whether the rights of the railroad company should be protected on the ground that the company has thus acquired rights of private property, of which it can not be divested except by due process of law, is a theoretical and not a practical question. The result to be reached in either case would be the same.

The question now under examination is whether the act when passed and accepted by the company became a contract within the meaning of this clause. It would seem that it could not be regarded as irrevocable, because of work done under it by the railroad company, but that for the protection of rights thus subsequently acquired, the company must look to the provisions of the State and Federal constitutions protecting private property already referred to.

This view also seems to be warranted by the authorities hereafter cited. In every case where additional privileges were conferred upon corporations by legislation subsequent to their charters, it is probably the fact that on the faith of the existence of such additional powers, corporate action was taken, and corporate moneys expended. But this would necessarily be treated as done by the corporation in contemplation of the power to withdraw the privilege so granted, at legislative discretion. Such withdrawal would leave the property of the corporation still subject to its control and use for such corporate purposes as were not affected by the repealing act.

It is well settled by the decisions of this court, that where, by the charter of a corporation, an immunity from taxation is granted, this becomes a part of the contract between the corporation and the State, which cannot be impaired by subsequent legislation. But it is equally well settled that where such privilege or immunity is granted by statute after the incorporation of the company, it may be withdrawn by the Legislature at pleasure, unless there be some new consideration to support it. This principle was held in

Christ Church v. *Philadelphia*, 24 How. 300,

the same doctrine having previously been announcd in

Providence Bank v. *Billings*, 4 Peters, 514.

In the latter case, however, the original charter contained no stipulation for exemption from taxation, and in that case it was held that the case of

Fletcher v. *Peck*, 6 Cranch, 87,

was inapplicable.

In *Phalen* v. *Virginia*, 8 How. 163, this court held, where the Legislature of Virginia had, in 1829, authorized a turnpike corporation to raise money by a lottery to repair a turnpike, this authority not having been used in 1834, and then another act was passed providing that six years should be allowed for that purpose, that the second act was not within the prohibition of the constitutional provision under consideration.

In another case it was held, where the Legislature of Michigan had accepted a railroad land grant, made by act of Congress, and had granted those lands to a railroad company, and by a subsequent provision of law exempted the land from local taxation for three years, that the

Legislature was not thereby precluded from subjecting them to taxation before the three years had elapsed.

Tucker v. *Ferguson*, 22 Wall. 527–574.

This court there said:

"The provision of the thirty-seventh section of the "act of 1871, exempting the lands specified from local "taxation until three years from the 1st of April, 1871, "which period has not elapsed, was not a contract. There "was no consideration. The company was required to do "nothing, and did nothing, in return. As between indi- "viduals, the stipulation would belong to the category of "*nude pacts*. It has no higher character because one of "the parties was a State, the other a corporation, and it "was put in the form of a statute. It was the promise of "a gratuity, spontaneously made, which might be kept, "changed or recalled at pleasure."

These and other cases were considered in a subsequent case, where a fertilizing company, chartered by the Legislature of Illinois, and having been granted express authority in its charter to carry on its business at a place therein designated, and the company having accordingly there established its plant, and the Legislature having subsequently conferred full local government upon the village within the borders of which the company had located, exempting, however, the company from the exercise of these powers for two years; and where, after the expiration of that time, the village adopted an ordinance making it unlawful for any person to carry on business such as the company was then carrying on within the village, and enforced the same against railroad employés transporting material to the place of business of the company; and it was held that the charter was not a contract guarantee-

ing to the company for its duration exemption from the exercise of the police power.

Fertilizing Co. v. *Hyde Park*, 97 U. S. 659.

The cases already cited and others were commented upon and re-affirmed. Mr. Justice Strong dissented on the ground that the charter was a contract.

The subject was fully considered in

Newton v. *Commissioners*, 100 U. S. 548-561.

Mr. Justice Swayne delivered the opinion of the court.

The legislation which in that case it was claimed constituted a contract, was an act providing for the location of the county seat of a county in Ohio, which declared that the county seat should be there permanently established. Thereafter the Legislature changed the location to another town, and the citizens of the former town endeavored to enjoin the contemplated removal.

It was held, first, that this was not a contract within the meaning of the clause in the constitution under consideration. It was also suggested that such a contract must not be a mere gratuity, but there must be a sufficient consideration, or no matter how long the alleged right has been enjoyed, it may be resumed by the State at its pleasure.

In a very recent case this court decided that where a ferry having been licensed and established at an early day in Virginia, and subsequently, by general law, it was provided that courts of the different counties should not license a ferry within a half mile from an established

ferry, that this law had nothing in it in the nature of a contract.

Belmont Bridge v. *Wheeling Bridge*, 138 U. S. 287.

Mr. Justice FIELD, in deciding this point, employed the following language:

"The subsequent general law of Virginia, passed in "1840, prohibiting the courts of the different counties "from licensing a ferry, had in it nothing of the nature of "a contract. It was a gratuitous proceeding on the part "of the Legislature, by which a certain benefit was con- "ferred upon existing ferries, but not accompanied by "any conditions that made the act take the character of a "contract. It was a matter of ordinary legislation, subject "to be repealed at any time when, in the judgment of the "Legislature, the public interest should require the repeal."

In another case, the doctrine that an act of the Legislature of a State exempting property of a railroad company from taxation, is not, when gratuitous, a contract under the Federal Constitution, was re-affirmed.

Wisconsin Railroad Co. v. *Supervisors*, 93 U. S. 595.

In *Stone* v. *Mississippi*, 101 U. S. 814, it was held that a charter granted by the Legislature of Mississippi to a lottery company for twenty-five years was a mere license and not a contract.

In that case it was clearly pointed out that it is not the charter which is protected, but only any contract the charter may contain.

The same general doctrine is announced in

Pennsylvania R. R. Co. v. *Miller*, 132 U. S. 75.

So it has been held that where a right to maintain a ferry is given by legislative enactment, which right is not then made exclusive, but is made so by subsequent act, the latter not being upon consideration is not a contract, and is repealable.

Johnson v. *Crow et al.*, 87 Pa. St. 184.

The same is held as to an act conferring exclusive privileges upon a railway passed subsequently to its charter.

Philadelphia, etc., Co's Appeal, 102 Pa. St. 123.

So a bounty law offering ten cents per bushel for salt manufactured in Michigan, was held to be repealable in a suit brought by a salt company organized under the law, and having expended large sums in the erection of works for the purposes of its business.

Salt Co. v. *E. Saginaw*, 13 Wall. 373.

Mr. Justice BRADLEY explained the theory upon which charters granted to private corporations are by this court held to be contracts. He observed:

"The case differs entirely from those laws and "charters which have been adjudged to be irrevocable "contracts. Charters granted to private corporations "are held to be contracts. Powers and privileges "are conferred by the State, and corresponding "duties and obligations are assumed by the corporation. And if no right to alter or repeal is reserved,

"stipulations as to taxation, or as to any other matter "within the power of the Legislature, are binding on "both parties; and, so corporations formed under general "laws in place of special charters, like the Ohio banks "under the general banking law of that State, are entitled "to the benefit of specific provisions and exemptions con- "tained in those laws, which are regarded in the same "light as if inserted in special charters. 'The act is as "special to each bank,' says Justice McLEAN, delivering "the opinion of this court, 'as if no other institution "were incorporated under it.' In such cases the scope of "the act takes in the whole period for which the corpora- "tion is formed. The language means that, during the "existence of any corporation formed under the act, "the stipulation or exemption specified in it is to "operate."

He also used this language, which is not inapplicable to the legislation under consideration:

"There is no obligation on any person to comply "with the conditions of the law. It is a matter purely "voluntary; and, as it is purely voluntary on the one part, "so it is purely voluntary on the other part; that is, on "the part of the Legislature, to continue, or not to con- "tinue, the law."

As has already been seen, the railroad company undertook no obligation under this law. It was free to act under it or to decline to do so. As to the purchase by this and other companies of the land north of Monroe street for depot grounds, while it originally started to acquire this land by complying with the terms of the law, it, after some resistance by the city, withdrew, as it had a clear right to do.

So Cooley, in his work on Constitutional Limitations, declares (280–281) that an agreement by a State for a consideration received, or supposed to be received, that property should be exempted from taxation, is a contract protected by the Constitution, but that there must be a consideration, so that the State can be supposed to have received a beneficial equivalent.

The case of *University* v. *People*, 99 U. S. 309, is not inconsistent with the authorities cited. There this court assumed, in deference, as it was said, to the Supreme Court of Illinois, the existence of a contract (p. 322), but differed with that court on the question of the power of the Legislature to make such a contract.

It is thought that there is a strict analogy between those cases which hold that the State may bargain away its power to tax the property of a corporation by granting in a charter immunity from taxation, but that such a privilege, granted after incorporation, is gratuitous and revocable; and the principle that a State may, on consideration, grant, to some extent, privileges in the shore and adjacent beds of navigable waters, but that such grant, until acted on, or unless on consideration, is revocable. The control which the State exercises over navigable waters is, like the taxing power, an incident of its sovereignty. Such control must be exercised in aid of the special trusts in favor of the public use, on which the right of the State, in so far as it at all partakes of the nature of ownership, is held. (*Bedlow* v. *N. Y. Floating Dock Co.*, 112 N. Y. 263–73–4, *supra*.)

If such use seems, to legislative judgment to be promoted by a grant of special privileges, in consideration of the rendering of some equivalent to the State, such grant might, perhaps, be regarded as a contract. But in so

far, if at all, as it lessened governmental and municipal authority, it would be in derogation of sovereign right, and no such grant could be sustained as other than permissive during its existence and before withdrawal, except upon the theory that for it the State had received an equivalent. For this right of the State to the bed of navigable waters pertains to sovereignty, and attaches in virtue of its sovereignty.

But whether this analogy is admitted or not, the principle so repeatedly declared in those cases, that a privilege gratuitously bestowed upon a corporation is not a contract which may not be impaired by subsequent legislation, is clearly applicable and controlling.

If, however, it should be assumed—and no such concession can be made, except for the sake of argument—that the grant to the railroad company of the bed of the lake is irrevocable, the practical result is the same.

The railroad company was wholly lacking in charter power to take this grant in 1869.

On that point its learned general counsel observed, with great force, in the court below, as follows:

"But the question here is not whether it was compe-
"tent for the company, under its original charter, to
"acquire lands for the purpose of constructing wharves
"and slips alongside its works in the outer harbor of Chi-
"cago.

"The State may authorize a corporation to alter its
"original enterprise, and exercise new powers or franchises
"to any extent. It was, therefore, competent for the State
"to vest the Illinois Central Railroad Company with the
"authority to take the title to these submerged lands for
"the purposes specified in the grant, and it has clearly
"done so by the act of 1869."

This view seems to have been adopted in the opinion of the Circuit Court (*Trans. 216*). If the grant of the bed of the lake be so far irrevocable as to prevent the Legislature from divesting title of the railroad thereto, clearly no such character can be imputed to the grant of privileges to the company to deal therewith in excess of its charter powers. Under the authorities cited such grant is clearly revocable. In this view, the railroad company would hold mere legal title to the bed of the lake, but without any right to the beneficial use thereof, and in absolute and organic incapacity to deal with it in any way. It concededly was not granted to the company for track and yard room. It was granted, if at all, as suggested by counsel in aid of "the purpose of constructing wharves and slips, etc." The company, by the repeal of that enabling act, is left powerless to make any use whatever of the land under water claimed to have been granted.

This consideration tends materially to strengthen the view taken by the court below, that the act of 1869 was not a legislative gift or grant of land to the company, but a devolution by law upon that corporation as an important public agency of the right to improve the harbor which the State might either exercise itself, commit to the municipality or confer upon some other suitable agency.

The disposition of the railroad company to utterly disregard the high and important public trusts thus attached to the legislative grant; to seek to pervert it to a mere donation which might be rightfully employed to swell the enormous acquisitions and growing revenues which, as the beneficiary of State and National bounty, the company now enjoys; to fasten upon the Legislature of the State the imputation of gross dereliction in public duty, wanton breach of a high public trust, and willful disregard

of private right, cannot commend its case to the favorable consideration of this court.

The State never intended irrevocably to commit the control of the harbor of Chicago to this railroad. It was a grave mistake to assume that its management could rise superior to the mere pecuniary interests with which it is concerned, and undertake, in a broad and liberal spirit the execution of this great work; and when that mistake became apparent it was the clear duty of the Legislature to revoke its commission to the company, and remit the subject to the control of the city, where it rightfully belongs. The company had no right to undertake such a public work unless under a deep sense of public responsibility and with a full appreciation of its public duty. It had no right to accept these privileges with the sordid purpose of extracting from their exercise the largest pecuniary returns at the expense of the public interests. Its course, and the history of similar attempts to enlist private capital in the service of the public, warrant the conclusion that its management was keenly alive to the pecuniary advantages to be derived by the company from this legislation, but absolutely indifferent to the demands of the public interest which it had undertaken to serve.

This argument is submitted with a deep sense of the grave responsibility which rests upon those who represent the city before this court. In the decision of this case are involved interests of incalculable pecuniary value; they are so great that if established in the railroad company by the final judgment of this court, it may well be doubted whether the city can, even in the exercise of the power of eminent domain, again resume them. The practical effect of such a decision would be to give this

water-front and harbor over to the company as a mere agency of private gain, and to strip this imperial metropolis of her rightful authority and dominion; to give to the company the right in part to close the gateways of her commerce and to bar the highways of her trade.

Her necessities, great when the case was heard below and justly considered, have vastly increased. Her population has doubled, and her trade and commerce far outstripped the growth of her population. It is impossible to say how soon, in the not distant future, it will be absolutely essential that an outer harbor shall be established or this city compelled to relinquish her proud supremacy as the metropolis of the West, and see her trade and commerce diverted, and all her material interests languish. If the Legislature of the sovereign State of Illinois has lawfully decreed that these results must follow, unless this railroad shall graciously concede something from the gift of fabulous value which it claims, certainly this injurious result, though disastrous and alarming to the last degree, must be accepted

But it ought not to be so declared, unless inevitable. A conclusion so at variance with natural justice, so destructive of public interests, so hostile to popular right, so injurious to the material interests of a great community, can only be reached upon absolute demonstration of its entire legal propriety. To doubt in such a case is swiftly to deny.

It is submitted that the company has not established its claims, and that, to the extent that they have been denied and the rights of the city vindicated and established, the decree appealed from should be affirmed.

Respectfully submitted,

S. S. GREGORY,

Counsel for the City of Chicago.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
APPELLANT,

vs.

THE CITY OF CHICAGO ET AL., APPELLEES.

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The copy of the Lake Front act of 1869 printed in the writer's brief, at page 67, owing to clerical errors, is inaccurate. It is found in the transcript at page 188, and again at page 634, but for convenience of reference, as time is wanting to make corrections properly in the brief, it is printed separately.

There is also appended a copy of an opinion filed recently in the court of appeals of New York, touching the question of how far a railroad can in virtue of its ownership of its roadbed be regarded as entitled to the rights of a riparian proprietor.

Respectfully submitted.

S. S. GREGORY,
Counsel for the City of Chicago.

An act in relation to a portion of the submerged lands and Lake park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that all right, title, and interest of the State of Illinois in and to so much of fractional section 15, township thirty-nine, range fourteen east of the third principal meridian, in the city of Chicago, county of Cook, and State of Illinois, as is situated east of Michigan avenue and north of Park row and south of the south line of Monroe street and west of a line running parallel with and four hundred feet east of the west line of said Michigan avenue, being a strip of land four hundred feet in width, including said avenue, along the shore of Lake Michigan and partially submerged by the waters of said lake, are hereby granted in fee to the said city of Chicago, with full power and authority to sell and convey all of said tract east of said avenue, leaving said avenue ninety feet in width, in such manner and upon such terms as the common council of said city may by ordinance provide: Provided, That no sale or conveyance of said property, or any part thereof, shall be valid unless the same be approved by a vote of not less than three-fourths of all the aldermen-elect.

SEC. 2. The proceeds of the sale of any and all of said lands shall be set aside and shall constitute a fund, to be designated as the "Park fund" of the said city of Chicago, and said fund shall be equitably distributed by the common council between the South division, the West division, and the North division of the said city upon the basis of the assessed value of the taxable real estate of each of said divisions, and shall be applied to the purchase and improvement in each of said divisions, or in the vicinity thereof, of a public park or parks, and for no other purpose whatsoever.

SEC. 3. The right of the Illinois Central Railroad Com-

pany under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use, and control and the riparian ownership incident to such grant, appropriation, occupancy, use, and control, in and to the lands, submerged or otherwise, lying east of the said line running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad Company for the distance of one mile and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one south of and near to the round-house and machine shops of said company, in the South division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: Provided, however, That the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same; and that all gross receipts from use, profits, leases, or otherwise of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter; and provided, also, that nothing herein contained shall authorize obstructions to the Chicago harbor or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assembly which

may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor; and provided further that any of the lands hereby granted to the Illinois Central Railroad Company and the improvements now or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation.

SEC. 4. All the right and title of the State of Illinois in and to the lands, submerged or otherwise, lying north of the south line of Monroe street and south of the south line of Randolph street, and between the east line of Michigan avenue and the track and roadway of the Illinois Central Railroad Company, and constituting parts of fractional sections ten and fifteen, in said township thirty-nine as aforesaid, are hereby granted in fee to the Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company, their successors and assigns, for the erection thereon of a passenger depot and for such other purposes as the business of said company may require: Provided, That upon all gross receipts of the Illinois Central Railroad Company from leases of its interest in said grounds or improvements thereon or other uses of the same the per centum provided for in the charter of said company shall forever be paid in conformity with the requirements of said charter.

SEC. 5. In consideration of the grant to the said Illinois Central; Chicago, Burlington and Quincy, and Michigan Central Railroad Companies of this land as aforesaid, said companies are hereby required to pay to said city of Chicago the sum of eight hundred thousand dollars, to be paid in the following manner, viz: Two hundred thousand dollars within three months from and after the passage of this act;

two hundred thousand dollars within six months from and after the passage of this act; two hundred thousand dollars within nine months from and after the passage of this act; two hundred thousand dollars within twelve months from and after the passage of this act; which said sums shall be placed in the park fund of the said city of Chicago and shall be distributed in like manner as is hereinbefore provided for the distribution of the other funds which may be obtained by said city from the sale of the lands conveyed to it by this act.

SEC. 6. The common council of the said city of Chicago is hereby authorized and empowered to quitclaim and release to the said Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company any and all claim and interest in and upon any and all of said land north of the south line of Monroe street, as aforesaid, which the said city may have by virtue of any expenditures and improvement thereon or otherwise; and in case the said common council shall neglect or refuse thus to quitclaim and release to the said companies as aforesaid within four months from and after the passage of this act, then the said companies shall be discharged from all obligation to pay the balance remaining unpaid to said city.

SEC. 7. The grants to the Illinois Central Railroad Company contained in this act are hereby declared to be upon the express condition that said Illinois Central Railroad Company shall perpetually pay into the treasury of the State of Illinois the per centum on the gross or total proceeds, receipts, or income derived from said road and branches stipulated in its charter, and also the per centum on the gross receipts of said company reserved in this act.

SEC. 8. This act shall be a public act and in force from and after its passage.

Passed, over veto, 16th April, 1869.

COURT OF APPEALS.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO., *Appellant*,

vs.

THOMAS ALDRIDGE, *Respondent*.

Four Cases.—October 4, 1892.

Robert F. Wilkinson, for appellant; H. H. Hustis, for respondent.

PECKHAM, *J.*:

The plaintiff has brought these actions to recover the possession of certain lands in the town of Fishkill and county of Dutchess, of which it claims to be the owner, and it alleges the defendant wrongfully withholds the same from it. The cases were tried at Poughkeepsie, before one of the justices of the supreme court, without a jury, and the court found that the plaintiff was not the owner of the lands, but that the defendant was, and thereupon judgments were entered in favor of defendant as owner and against the plaintiff for costs. These judgments were, upon appeal, affirmed by the general term of the second department, and from that affirmance the plaintiff has appealed to this court.

The land was, prior to the year 1846, under the waters of the Hudson river and on the east side thereof. The title to one portion of the adjacent upland was at that time in the executors of the will of John Van Vliet, deceased, and the title to the other portion was in one Isaac Brinkerhoff.

The Hudson River Railroad Company was incorporated, by virtue of chapter 216 of the Laws of 1846, for the purpose of constructing a railroad along the east side of the Hudson river from New York to Albany. Pursuant to the provisions of law, the New York Central Railroad Company and the Hudson River Railroad Company were duly consolidated in 1869 under the name as given in the title of this action, and such corporation has succeeded to all the rights, powers, and privileges which the Hudson River Railroad Company was possessed of. Pursuant to the provisions of section 4 of the act of 1846, above cited, examinations, surveys, and maps were made in order to provide for the most advantageous line for the location of the road, and after such examinations and surveys were made the directors of the company duly designated the line for the road as it passed along through the town of Fishkill, in the county of Dutchess, and the proper certificate thereof was duly filed in the office of the clerk of Dutchess county, as provided for by law. The statute provided further that this course so selected and certified should be the line on which the corporation should construct its road. The land in question, after the course of the road had been duly selected and adopted, lay outside and west of the west line of such course and under the waters of the Hudson river. The railroad company obtained the strip of land along and upon which it finally built its road by a conveyance from the executors of John Van Vliet, deceased, and from Isaac Brinkerhoff and wife, the executors owning the north and Brinkerhoff and wife the south portion of such strip.

By chapter 30 of the Laws of 1848 the legislature amended the act of 1846, and by section 5 of such amendment it gave power to the directors to adopt a new and altered location for the road if at any time they thought it best to adopt one in place of and as a substitute for the old location, and a map of the course as altered was to be filed in accordance with the provisions of that section. The railroad company

built and operated its road on the land conveyed to it by the executors of Van Vliet and by Brinkerhoff and wife, and so continued for about twenty years without alteration or amendment of its line. After the expiration of that time and on the 30th of September, 1868, the company assumed under the amendment of 1848 to modify its location and alter its line and filed a map thereof as provided by law. The modification and alteration consisted simply in carrying or pushing its original westerly exterior line some distance further to the west. Subsequently and on the 10th of November, 1868, an additional alteration and modification of its westerly line was made by the company and a map thereof filed, by which that line was carried still further to the west. These so-called modifications and alterations of the westerly line of the location, course, or route of the railroad would include the land in question, and the plaintiff claims title thereto under the provisions of the charter and its amendments, and also by virtue of a conveyance from the commissioners of the land office. Prior to this time the title to the lands was in the State.

We think the plaintiff acquired no title to the lands in question by reason of these alleged alterations.

By the original act of 1846 the railroad company was to adopt a certain line, course, or way for the railroad and such as the directors should declare most advantageous, and this course so selected, the statute said, should be the line on which the road should be built. The State, however, did not in any of the statutes relating to the railroad convey any land to the company which belonged to the State, either above or under water. The act of 1846 gave no such title; neither did section one or five of the amendment of 1848. The most that could be urged was perhaps a mere implied license to the company to build along the course selected, even though lands of the State were included therein. This gave no title to the land embraced in such course. The land was to be acquired subsequently.

As to lands belonging to individuals, the company secured no title by selecting and adopting a course and filing a map. It still had to purchase such lands or else obtain them by the exercise of the right of eminent domain. There is no provision in the law which makes a different result where the lands belong to the State. Under the general railroad act of 1850 the commissioners of the land office are empowered by section 25 to grant to any railroad company formed under that act any land belonging to the people of the State which may be required for the purpose of the road upon such terms as may be agreed on by them; and by section 49 of the same act all railroad companies within the State are granted all the powers and privileges contained in the act; so that plaintiff had the right thereunder to apply for a grant of land under water belonging to the State, if the same were required for the purposes of its road, and upon terms to be agreed on between the company and the commissioners of the land office.

The fifteenth section of the act of 1846, incorporating the railroad company, contemplates the building of a bridge over the Spuyten Duyvel creek by the company, and also bridges over other creeks and navigable streams and inlets, and the act also assumes that the company will cross the bays along the river; but there is no grant by the State of any land under the water of these bays or inlets and no title is conveyed by any statute that I have seen. The State has permitted the building of the road across these waters and probably, through its commissioners of the land office, it has granted, in most instances, the title to such lands under water as were used by the company. There is nothing, however, in the statutes themselves which operates as a transfer of the title. When the alterations made under the act of 1848 called for lands belonging to the State, the title thereto was not conveyed by the making of such alterations or by the filing of a map thereof. In addition to this view, it would seem that the act of 1848 applies only to what is in reality

an alteration and not to that which is a mere addition to the original location or course. The part added is not a new course and is in no sense a substitute for the old one, as the statute unquestionably contemplates it should be. There are thus two difficulties with the plaintiff's contention as to the effect of the alleged alteration. The statute, in the first place, does not contemplate a mere addition where there is to be no alteration and substitution. In the next place, if the alteration claimed was within the purview of the statute the company would thereby be clothed with a power to so locate its route, and the necessity would still remain of acquiring the land contained in the proposed alteration, either by purchase or condemnation, if from private individuals, or by grant, if from the State.

It is too clear for more extended argument that the company acquired no title to the lands in question by reason of any assumed modification or alteration of its original course and the filing of a map indicating such alteration.

The plaintiff, however, does not rely alone upon these alterations. On the 26th of December, 1873, the commissioners of the land office, pursuant, as is stated, to section 25 of the general railroad act already referred to, granted to the plaintiff all the land under water embraced within the boundaries of its amended locations of 1868.

The plaintiff now claims that, by virtue of the locations made by the railroad company in 1868 and of the grant from the commissioners of the land office in 1873, it has acquired title by legislative grant to the land in question, and that such title is paramount to that of the defendant. The decision of this question requires a statement of some additional facts.

The conveyances from the executors of Van Vliet and from Brinkerhoff and wife to the railroad company embraced a strip of land wide enough for its tracks to be laid on, and the eastern boundary of this strip was above high-water mark and ran along the front of the farm as it had

been bounded by the river, thus taking in the front of the farm so bounded, and thereby, as is claimed, wholly divesting the grantors of their character of riparian or adjacent owners.

It is through conveyances made by these grantors that the defendant claims title to the farm lands immediately east of the strip of land so granted to the company, and it is by reason of such conveyances that the defendant claims to be owner of the adjacent uplands, and hence a proper party to receive a grant from the State of the adjoining lands under water.

The deed from the executors to the railroad company contained this declaration: The said parties of the first part, however, hereby reserve to the estate of said John Van Vliet deceased, and for the benefit thereof, all rights to all land lying below high-water mark of the Hudson river, except such portion as is taken for the use and occupation of said road as laid out and located as aforesaid and as particularly described in said map. The deed from Brinkerhoff and wife contained a similar declaration. Both deeds conveyed the respective lands to the company as a strip of land (using the language of the deed) through the lands and premises of the grantors, "as laid out and located as part of the route of the railroad as then located and more fully shown on the map annexed." The deed from the executors of Van Vliet, dated April 1, 1851, to defendant was made "subject, nevertheless, and hereby especially excepting and reserving from the within-described lot of land the line of the Hudson River railroad as now in the use and occupation of the said, Hudson River Railroad Company." The deed from Brinkerhoff and wife to defendant, and dated January 2, 1854, contained substantially the same exception. The defendant, having thus become the owner of the upland farm from which this strip was taken for the purposes of and by the railroad company, made application to the commissioners of the land office and filed his petition to them on the 14th

of May, 1867, asking for a grant of land under water adjacent to his upland. This application would seem to have been opposed by the railroad company, and while it was pending before the commissioners the company, on the 30th of September and the 10th of November, 1868, assumed to make the alterations in its course as already described.

On the 5th of May, 1869, the commissioners of the land office granted the application of the defendant and issued a patent to him for the lands under water, which are the same lands embraced in the complaint herein. This patent was made "subject to all rights and privileges in and to said premises or any part thereof which the Hudson River Railroad Company may have acquired under its charter."

The patent from the commissioners of the land office to the plaintiff bears date December 26, 1873, more than four years subsequent to that of the defendant. The patent to the defendant being prior in point of time to that granted to plaintiff would seem to make the title of the defendant the better of the two. The plaintiff answers this by stating that the defendant was not the owner of the adjoining upland, and consequently could not legally obtain a grant of these lands under water. It is further stated that the patent to defendant was granted expressly subject to all rights and privileges in and to the premises or any part thereof which the railroad had acquired under its charter. The act, chapter 283 of the Laws of 1850, while providing for the granting of lands under water to the proprietor of the adjacent upland, also prohibits the commissioners from making any grant to interfere with the rights of the Hudson River Railroad Company. What those rights were must be determined. The simple claim that the patent of the defendant is void because he was not the upland proprietor (even if well founded in fact) could not be urged in this action, which is a purely legal one, to obtain possession of real estate on the ground that plaintiff is the owner thereof. There is no fact set up in the complaint calling for the exercise of the equitable powers

of the court, and the plaintiff must succeed by showing the better legal title.

It has been frequently held that a patent such as this, which is not void on its face and which requires evidence *de hors* the instrument to show its invalidity, can only be assailed in a direct proceeding to review the action of the commissioners or by an action in equity to set aside the patent. (Blakeslee Co. *vs.* Blakeslee's Sons Iron Works, 129 N. Y., 155, and cases cited.)

The claim that defendant could not legally obtain a grant of these lands because not the owner of the upland is thus disposed of, so far as this action is concerned.

We have seen that the plaintiff by assuming to make the alterations alluded to acquired no legal title to the land embraced within the limits of the proposed alteration. If it be conceded that the company had power to alter its course in the manner it assumed to do, the alteration did not in any manner affect the power of the commissioners of the land office to make a grant to an upland proprietor of the land under water, although it was included in the proposed alteration. A private owner of land prior to the purchase or condemnation thereof by a railroad would not be precluded from selling it because it was included within the terms of the original or altered location of the road, and the commissioners of the land office would not on that ground be prevented from granting such lands any more than an individual owner. The right is given to the commissioners by section 25 of the railroad act of 1850 to grant to the company any land belonging to the people of the State, which may be required for the use of the railroad, on such terms as may be agreed upon by them.

The fact that the lands are included in a proposed alteration of the course of the road may be evidence that they are needed by the company for its use, and when the company makes its application to the commissioners, if the lands still belong to the State the commissioners may grant them

on terms to be agreed upon. There is nothing in the statute, however, which in any way affects the power of the commissioners to grant the lands to an upland proprietor after the proposed alteration has been surveyed and mapped as well as before. If the commissioners have so conveyed, the company must negotiate with their grantee. If they have not conveyed, then the terms upon which the conveyance is to be made must be agreed upon between the commissioners and the company, and there is nothing in the statute from which it is to be inferred that the commissioners are under any obligation to convey for less than the value of the land or upon any more favorable terms than they would impose upon the owner of the upland.

At the time of the granting of the patent to the defendant there were no rights or privileges, properly so called, vested in the company to which the patent to the defendant was subject. The right to apply to the commissioners for a grant of land belonging to the people was not touched, and the right to prevent the commissioners from granting land under water belonging to the people to the upland proprietor did not exist, and hence was not invaded. It is thus apparent that neither claim of the plaintiff is adequate as an answer to priority of the patent to the defendant.

As the case is here, however, we think it proper to decide the other question before us—whether the defendant at the time he took the grant from the commissioners was an upland owner within the meaning of the statute upon that subject. This point has been fully argued by counsel for the respective parties, and we think it should be met and decided now.

The case of Rumsey *vs.* Railroad Co. (114 N. Y., 423) would seem to be nearly decisive of this. It is true there is some difference in the facts. In the Rumsey case the railroad was built partly on an embankment and partly on piles through the waters of the river, and at some distance from the shore, and the tide ebbed and flowed in the inter-

vening space. In this case the company received a grant which takes in a strip partly below and partly above high-water mark. This fact the plaintiff urges is most material, for it is claimed it is thereby made a riparian owner, and even if it could not itself receive a grant as such (which it does not admit) it prevents the owner of the land adjoining its own from being regarded as a riparian owner, and hence prevents the granting of a patent for lands under water to him. The fact that a small quantity of water intervened between the shore and the railroad was not regarded in the Rumsey case as very material. The fact was adverted to as bringing the plaintiff directly within the class of persons indicated by the statute to whom grants of land under water might be made; but the character of the occupation of the land by the railroad company, whether it fairly could come within the meaning of the statute as an owner of upland to which a grant of adjacent lands under water could be made, were the two main points discussed in the opinion and upon which the strength of the reasoning was expended.

It was said that it could not be so regarded and the reasons given are, we think, quite satisfactory. It is unnecessary to here repeat them. The counsel for the plaintiff does not claim the lands by virtue of its own ownership of the upland, but under a different statute (General Railroad act of 1850, secs. 25 and 49). It is said, however, that by the deeds to the company the defendant's grantors destroyed their rights to a grant and put such a grant forever beyond the reach either of themselves or their grantees, and that by virtue of such deeds they vested the company with rights inconsistent with any right to a grant on their part.

We have held that the power conferred by statute upon the commissioners of the land office authorizes them to convey lands under water to the owners of the adjacent uplands, and that those owners when they conveyed the uplands could not reserve the right to obtain a grant of the adjoining lands under water. This was because the right

or privilege conferred by the statute is regarded as appurtenant to the upland and vests in the owner thereof, and it cannot exist severed from such ownership. (Blakeslee Co. *vs.* Blakeslee's Sons, &c., Co., 129 N. Y., 155.)

If the defendant's grantors by their deeds to the railroad company ceased to occupy the position of owners of the adjoining uplands within the meaning of the statute, it would probably follow that the patent to the defendant was illegal. We do not, however, so regard the effect of these conveyances. The company took the lands for the use of its road and for that only. The deeds conveyed the land for that purpose only. At the time when the strip was conveyed to the company it had determined and located its line, and the conveyance simply granted that which was included in such location. The company received and holds such land in fee simple by the voluntary grant of the former owners, and by the provisions of the statute it holds such real estate and can use it only for the purposes expressed in its charter—that of the maintenance, construction, and accommodation of the railroad. For this purpose only the land can be used, and although the title granted to the company is a fee, yet, as thus burdened and restricted, we think the grantor in conveying the strip did not thereby cease to be the owner of the upland within the meaning of the statute.

The conveyance to the railroad of the strip in question is in its effects entirely unlike the conveyance to a private individual in fee simple. In the latter case it may well be the grantor even of so narrow a strip would lose his character of riparian owner and the grantee would acquire it; but when we consider the purpose of the conveyance to the railroad and the limitations to its use which the statute itself placed upon the company, it becomes entirely plain that the grantor ought not to lose his character of riparian owner where he retains the property immediately adjoining that which he conveys (chap. 216, Laws of 1846, sec. 9; chap. 30, Laws of 1848, sec. 9). Grants of land under water were

authorized to be made to the upland proprietor for the purpose of promoting the commerce of the State. A railroad company authorized only to do the business provided by its charter as a railroad could certainly not promote the commerce of the State, and hence would not come within the class of persons named by the acts conferring power to convey lands under water for the purposes named in the acts. This has been so stated by Judge Brown in his opinion in the Rumsey case, and I fully concur therein.

The limitation placed by the statute upon the use of this strip of land by the railroad company precludes the ordinary consequences from attaching to a conveyance in fee of land. The grantor still remains the owner of the adjoining upland within the meaning of the statute and he or his grantees are the persons to whom a grant of land under water may properly and legally be made. The defendant having received his patent prior to that granted to plaintiff, and the plaintiff then having no rights or privileges to which the defendant's patent was subject, it follows that a defense to this action was established.

Upon a review of the whole case we are persuaded the plaintiff failed to make out any title, and that the defendant duly proved that he was himself the owner of the land in controversy. We have looked at all the questions presented and argued by plaintiff's counsel and we think no error was committed on the trial, and the judgment of the general term should therefore be affirmed with costs.

"All concur."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

146 U.S. 387

FILED
JAMES H. MCKENNEY

Supreme Court of the United States,

OCTOBER TERM, A. D. 1892.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS *et al.*, *Appellees*.

THE CITY OF CHICAGO, *Appellant*,

vs.

THE ILLINOIS CENTRAL RAILROAD COMPANY *et al.*, *Appellees*.

THE PEOPLE OF THE STATE OF ILLINOIS, *Appellants*,

vs.

THE ILLINOIS CENTRAL RAILROAD COMPANY *et al.*, *Appellees*.

THE UNITED STATES, *Appellant*,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS *et al.*, *Appellees*.

BRIEF ON BEHALF OF THE STATE OF ILLINOIS.

GEORGE HUNT, *Attorney General*.

SPRINGFIELD, ILL.:
THE H. W. BOKER PRINTING HOUSE.
1892.

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BRIEF ON BEHALF OF THE STATE OF ILLINOIS.

GEORGE HUNT, *Attorney General*.

MAY IT PLEASE THE COURT:

The controversy to which these several appeals relate arises out of the claim of ownership by the Illinois Central Railroad Company of the submerged lands constituting the bed of Lake Michigan, lying east of the track and right of

way of said company on the eastern frontage of the city of Chicago. The area embraces about one thousand acres and includes the entire outer harbor of said city. The claim of ownership is based on an alleged act of the General Assembly of the State of Illinois of 1869, commonly called the Lake Front Act, upon the validity of which depends practically the whole case, so far as the railroad company is concerned.

I.

PASSAGE OF THE SO-CALLED LAKE FRONT ACT.

Was any such act ever passed by the General Assembly of the State of Illinois?

If this question is answered in the negative, all claim of ownership by the railroad company of these submerged lands is at an end.

We contend, on the part of the State of Illinois, that this so-called act never was passed in accordance with the requirements of the constitution of said State in force in 1869, and therefore never became a law. To support our contention we here give the provisions of the constitution of 1848 relating to the matter, and the history of the legislation referred to, so far as the same is questioned.

"Every bill shall be read on three different days in each house, unless in case of urgency, three-fourths of the house where such bill is so pending shall deem it expedient to dispense with this rule."

Constitution 1848, Article III, Section 23.

"Each house shall keep a journal of its proceedings and publish them."

Constitution 1848, Article III, Section 13.

The so-called Lake Front act originated in a bill known as House Bill 373, being a bill for "An act to enable the city of Chicago to enlarge its harbor, and to grant and to cede all the rights, title and interest of the State in and to certain lands lying on and adjacent to the shore of Lake Michigan on the eastern frontage of said city."

After its passage through the House of Representatives, in which body it originated, it was "ordered that the title be a bill for 'An act in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan on the eastern frontage of the city of Chicago,' and that the clerk inform the Senate thereof and ask their concurrence therein," and the bill thereupon went to the Senate for its action.

We contend that this bill was not read three times in the House or Senate as required by the foregoing provision of the Constitution and therefore it never became a law, and conferred no rights upon the railroad company.

In support of this position, we ask a critical inspection of the certified copy of the record of the Twenty-sixth General Assembly, relating to the bill in question, as it appears in printed record, pages 551–578.

1. HOUSE.

It appears that on January 13, 1869:

"Mr. Knickerbocker introduced a bill, House Bill No. 373, for 'An act to enable the city of Chicago to enlarge its harbor, and to grant and to cede all the rights, title and interest of the State in and to certain lands lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of said city,' which was read a first time and ordered to a second reading.

"On motion of Mr. Knickerbocker, the rule was dispensed with, and the bill read a second time and referred to the Committee on Municipal Affairs and Insurance.

"THURSDAY, February 4, 1869.

"Mr. Reynolds, from the Committee on Municipal Affairs and Insurance, to which was referred House Bill No. 373, for 'An act to enable the city of Chicago to enlarge its harbor, and to grant and to cede all the rights, title and interest of the State in and to certain lands lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of said city,' reported the same back with amendments, and recommended its passage as amended."

What the amendments proposed by the committee were, the House journal does not show, and we are left to discover their substance by the inspection of the copies of the original bill and of the bill as it is said to have finally passed. For the convenience of the court in this particular, copies of the original bill and the so-called Lake Front Act will be inserted in this brief.

The journal shows several minor amendments were added to the committee amendment in the House (printed record pp. 554-558).

On February 10th, "Mr. Childs moved the previous question on the majority report of the committee as amended, which was decided in the affirmative: Yeas 56; nays 26. So the main question was ordered and the question recurring upon concurring with the majority of the committee in their proposed amendment to House bill No. 373, as amended by the House, it was decided in the affirmative: Yeas 49; nays 29. So the report of the majority of the committee, as amended by the House, was adopted.

"Mr. Dinsmoor moved that the bill as amended be ordered to be engrossed for a third reading, and upon that motion demanded the previous question, and the question

being "shall the main question be now put," it was decided in the affirmative. And the question being upon ordering the bill as amended to be engrossed for a third reading, it was decided in the affirmative: Yeas 50; nays 30." (Names of members being omitted.)

February 20, 1869, (printed record page 559).

"The hour for the special order of to-day, 10 o'clock A. M., having arrived, the bill, House bill No. 373, for 'An act to enable the city of Chicago to enlarge its harbor and to grant and to cede all the rights, title and interest of the State in and to certain lands lying on and adjacent to the shore of Lake Michigan on the eastern frontage of said city was taken up.

"On motion of Mr. Dinsmoor, the previous question was ordered, on the passage of the bill.

"The bill was then read a third time, and the question being, shall this bill pass, it was decided in the affirmative: Yeas 52; nays 30." (Names of members omitted.)

"Ordered that the title be 'A bill for an act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan on the eastern frontage of the city of Chicago,' and that the clerk inform the Senate thereof and ask their concurrence therein."

It will be observed that the original bill after its introduction was read a first time; that the rule was then dispensed with and the bill read a second time before its reference to the committee. It was reported back from the committee with an amendment. Let us now see in what that amendment consisted?

Inspection of the original bill and what is known as the Lake Front Act discloses the fact that that amendment consisted in striking out all after the enacting words of the bill and inserting in lieu thereof what is now called the

Lake Front Act. Even with the parliamentary rights of a substitute, it was necessary, as such, that it take its place as a new bill, and go through all the readings of a new and original bill. This we submit was in no proper sense an amendment to the bill. It left nothing of the bill but the title, which, after the amendment was made, was false and misleading, and the enacting words, which formed no part of the provisions of or substance of the bill. Instead of an amendment, it perhaps might be termed a substitute, though even to call it a substitute would be awarding great latitude to the legislative powers of a committee, as the substitute neither related to the subject matter of nor was it germane to the purpose of the original bill. The primary purpose of the original bill was *"to enable the city of Chicago to enlarge its harbor,"* and the other matter expressed in the title was for the accomplishment of such primary purpose. (Opinion of Justice Harlan, printed record page 211.)

The record is full as to what transpired regarding the bill after the report of the committee. The result of the committee's report was the production of and the introduction into the House of an entirely new bill; new in form and new in substance.

The record nowhere shows that this bill as it came from the hands of the committee was ever read in the House either a first or second time.

We submit that it can not be said that such proceeding is either in letter or spirit a compliance with the requirement of the Constitution, that "every bill shall be read on three different days in each House, etc." As it finally

passed the House, there is no record showing that the so-called Lake Front Act was ever read in the House more than once. The facts stated in the record clearly and conclusively preclude the presumption that it was read more than once.

As House bill No. 373 finally passed the House, it contained no part of the original bill; no part of the bill which had been read a first and second time except the number, title and enacting clause.

Immediately after its passage it was stripped of its title, so that, as it went to the Senate, no part of it had ever been read three times in the House, except the words and figures "H." "B." "No. 373," and the enacting clause, "*Be it enacted by the People of the State of Illinois, represented in the General Assembly.*"

The question, we believe, has been discussed in our higher legislative councils, as to whether an old rudder attached to a ship which had been renewed in every part, made the entire vessel the same old ship to which the rudder originally belonged? Neither sophistry or logic has ever been able to convince the common mind that this question could be answered truthfully in the affirmative.

No more can it be said in this case, that this piece of legislation, which, as it passed the House, was new in substance in every legislative provision, was, because it retained the number and enacting clause, the same bill which had been twice read in the House.

We know that great latitude is exercised, in parliamentary usage, by legislative assemblies in the matter of amendments, and that, where unrestrained by constitutional limi-

tation, the power of the General Assembly, both in the matter and manner of legislation, is unlimited, within the domain of the legislative department; but the constitution of the State of Illinois is a limitation on the power of the General Assembly, and neither legislative power nor parliamentary usage will be permitted to contravene the mandatory provisions of the constitution.

The command of the constitution, that "every bill shall be read on three different days in each house," must be observed both in letter and in spirit. The attempt to evade this provision, under cover of amendment, whereby an entirely new bill is brought before the House, and at once placed upon the order of third reading without having been read a first or second time, as required by the constitution, is so palpable a fraud that it should not be tolerated.

The so-called Lake Front Act found its way to a place on the calendar of the House of Representatives by this means, and by this means alone. Unless this palpable evasion and disregard, both of the letter and spirit of the constitution, is maintained, this bill never became a law.

Can this species of legislative juggling be regarded either in spirit or in letter as a compliance with the provision of the Constitution, requiring that "every bill shall be read on three different days in each House," which provision, as we will hereafter show, the court says is mandatory and was placed in the Constitution to prevent improvident legislation and to abrogate the vicious practice of reading bills by their titles.

Having called the attention of the court to the history of the bill during its pendency in the House, we now invite at-

tention to its history in the Senate, and propose to discuss the force of the record and cite some authorities in relation thereto.

2. SENATE.

That the provision of the Constitution requiring three readings of the bill is imperative, will be denied by no one.

"In case of urgency," to be declared by a vote of three-fourths of the members, the readings on three different days may be dispensed with, and the bill may be read twice or three times on the same day, but it must in all cases be three times read; whether or not such readings were had can be shown only from the journals. That the journals may be appealed to where the passage of a bill is denied, is well settled as the law in the State of Illinois. Examination of the Senate journals fails to show that the bill in question was read a second time in that body, and on this point we again invite inspection by the court of the journal of the General Assembly as set forth in the record of this case, pages 574 to 588 inclusive, before referred to. It is also stipulated in this case that the court may inspect the printed journals of the Twenty-sixth General Assembly, printed record page 517, and in pursuance of this stipulation we ask the court to examine said journals and more particularly the Senate journal, volume 1, pages 679, 736, 737 and 844. Volume 2, pages 14, 22, 23, 267, 294, 340, 341, 345, 642, 643, 895 and 922. We maintain that such inspection must convince the court that no second reading of said bill was had in the Senate.

Were it not for one decision of the Supreme Court of Illinois relating to a similar question, there could be no

doubt whatever that the point which we raise on the passage of the bill would be absolutely conclusive against the defendant.

The decision to which we refer was in the case of the *Board of Supervisors of Schuyler County vs. The People ex rel. Rock Island & Alton Railroad Company*, 25th Ill., page 181, decided by our Supreme Court in 1860, and upon this decision alone counsel for defendant seem to rely, not to sustain the validity of the act, but to sustain the presumption that the act was valid. In that case the court said:

"The constitution does require that every bill shall be read three different times in each branch of the General Assembly before it shall be passed into a law; but the Constitution does not say that these several readings shall be entered upon the journal. Some acts required in the passage of laws are required by the Constitution to be entered on the journals in order to make them valid and among these are the entries of the ayes and nays upon the final passage of every bill, and we held in the case of *Spangler v. Jacoby*, 14th Ill., 297, that where the journal did not show this, the act never became a law. But where the Constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left to the discretion of either house to enter it on the journal or not and the silence of the journal of either house ought not to be held to afford evidence that the act was not done. In such a case we must presume it was done unless the journal affirmatively shows that it was not done."

It will be observed that the court in the foregoing language declares that the presumption exists that that was done which the Constitution requires shall be done in the passage of a bill. This, then, is only a presumption, and

is not conclusive but is subject to rebuttal, or to be removed by proper evidence. When the court said in that case:

"In such case we must presume that it was done unless the journal affirmatively shows it was not done," it was not meant that the journal should show by an affirmative statement therein that the bill was not read a first, second or third time. If the circumstances, or entries shown in the journal are such as to preclude the idea that three readings were had then this *presumption* is overcome. It is idle to contend that in order to rebut this presumption the journal entry must be made in the following words: "This bill was not read a second time." This would require record evidence of self-stultification on the part of the General Assembly, and no such intention will be imputed to the court.

It matters not whether a failure to comply with the constitutional requirements occurs through accident, mistake or design. It is inconceivable that a legislative body would intentionally omit what is regarded as a material requirement in the passage of a bill. To indulge such a supposition would be to accuse the legislature of trifling with its duties. As a matter of fact, therefore, such omissions are uniformly and invariably the result of accident, oversight or mistake, and yet the courts treat the result just as seriously and regard the mistake just as fatal as though the failure to conform to the constitution was the result of deliberate design.

If the entries found upon the journal are such as to preclude the presumption that the bill was read a second

time, then such presumption is effectually rebutted and removed, and the proof in this case shows affirmatively, so far as a negative fact can be affirmatively shown, that the bill was not read a second time.

In this connection we must remark that the declaration of the court that the silence of the journals as to the fact whether or not the bill was read a first, second or third time, ought not to be held to afford evidence that the act was not done, does not seem to be founded in reason. Section 13, Article III, of the constitution above quoted requires "Each House shall keep a journal of its proceedings and publish them." We maintain that every essential step in legislation is a part of the proceedings of the Senate, and that as such becomes a part of the Senate journal. The second reading of a bill is an essential step, and is as much a part of the proceedings of the Senate as the third reading. It is as much a part of the proceedings of the Senate as the calling of the ayes and noes on the passage of a bill. True, the constitution does require the ayes and noes as taken on the final passage of a bill to be entered on the journal, not because such vote is any more a part of the proceedings of the Senate than the second reading of a bill, but in order that conclusive evidence may always exist as to whether or not the bill, upon its final passage, received the number of votes required by the constitution.

The latter part of Section 13, Article III, of the constitution, is as follows:

"The yeas and nays of the members on any question shall, at the desire of any two of them, be entered upon the journals."

Section 14. "Any two members of either house shall have the liberty to dissent and protest against any act or resolution which they may think injurious to the public or to any individual, and have their dissent entered on the journals."

These, together with the ayes and noes on the final passage of a bill, are all the specific requirements of the constitution as to what shall be placed upon the journal. If, then, the language of the court in the case under discussion should be accepted as the rule, the journals of the General Assembly would constitute nothing more than a series of roll calls and protests. The proceedings of the General Assembly, so far as any record evidence thereof would exist, would constitute nothing more. Though the constitution requires in mandatory terms that every bill shall be read three times, no evidence thereof would anywhere exist; and as oral proof can never be adduced either to sustain or contradict the journal, the mere fact that a roll call showing its final passage appears on the journal, would be conclusive proof that the bill had been read a first, second and third time, as required by the constitution. This, we maintain, is not only wholly illogical, but is at war with the very purpose of the constitution in providing that each house shall keep a record of its proceedings, and is also at war with the well settled doctrine of the courts in this State that the journals may be appealed to to sustain or impeach the passage of an act of the General Assembly.

But granting, for the purpose of argument, that the rule is correctly stated in this decision, we maintain that the journal quite conclusively shows that House bill No. 373 was never read a second time in the Senate. In the first place, an inspection of both the House and Senate journals will show that this bill met strenuous and determined opposition at every stage of its progress, both in the House and in the Senate. Its advocates could do nothing with it except what they were able to do by force of numbers at any time. They never had sufficient strength to suspend the rules, or take it out of its order, or declare an urgency by a three-fourths vote, as provided in the constitution.

The printed Senate journal, volume I, pages 736 and 737 (printed record, page 574) has the following entry:

"MONDAY, February 22, 1869.

"House Bill No. 373, for 'An act in relation to submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago,' was taken up and read a first time.

"Mr. Tincher moved that the bill be laid upon the table to July 4th, which motion was lost by the following vote:

"Yeas 11, nays 14. (Omitting the names.)

"Mr. Munn moved that the bill be ordered to a second reading, which motion was carried by the following vote:

Yeas, 15; nays 10. (Omitting the names.)

"On motion of Mr. Tincher, the bill was laid on the table for the purpose of printing, and 200 copies ordered printed."

From this it will be seen that the bill was read a first time on the 22d of February and ordered to a second reading. In order that it might be read a second

time on that day, not only was the suspension of rule 9 of the Senate required (see printed record, page 517), but the declaration of the urgency, as provided in the constitution, by a three-fourths vote of the Senate, was necessary. In order to do this, nineteen Senators must have voted in favor of such suspension. A critical inspection of this record will show that at no time in the course of its progress did this bill ever have an affirmative vote of more than fifteen in the Senate. This, we maintain, is proper matter for the consideration of the court in determining whether or not, as a matter of fact, this bill was or could have been read out of its order at any given date. We show in this case that the opposition to the bill was active, watchful and determined, and that its progress was a continual struggle from the date of its introduction by the House committee until its final passage over the veto of the Governor. We insist that this proof abundantly rebuts the presumption that the bill was read a second time out of its order. But on motion of Mr. Tincher, last above referred to, the bill was laid upon the table for the purpose of being printed. That it was not and could not have been read while upon the table is self-evident.

Senate printed journal, volume 1, page 844 (printed record, page 575:)

"Mr. Munn moved that House Bill No. 373 be taken from the table and referred to a committee, which motion was carried by the following vote:

"Yeas 17; nays 7.

"On motion of Mr. Strevell, the bill was referred to the Committee on Judiciary."

While the vote in favor of committing the bill was 17 yeas to 7 nays, this does not militate against the statement heretofore made that the bill never had more than 15 affirmative votes on any proposition to advance it. The motion to commit or refer did not necessarily imply the advancement of the bill. On the contrary, it necessarily implied delay, and the opponents of the bill might readily vote for this motion.

The motion in this case shows for what purpose the bill was taken from the table, that purpose being included in the motion. It was before the Senate for the purpose of that motion alone, and could not have been read a second time under that motion. To have taken it out of the operation of that motion would have involved a suspension of the rule, and required a three-fourths vote, which its advocates were unable to command. In pursuance of that motion, it went to the Committee on Judiciary. We submit that the presumption that it was not read a second time under the operation of this motion is conclusive.

Senate printed journal, volume II, page 14 (printed record, page 575):

"Mr. Boyd, from the Committee on Judiciary, to which was referred House Bill No. 373, for 'An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago,' reported the same back and recommended its passage. The report of the committee was concurred in and the bill ordered to a third reading."

To have read the bill a second time under the operation of this order would also have required a suspension of the rule and required a three-fourths vote.

The bill has now been traced until it is placed upon the order of third reading. Not only has no second reading ever been shown, but its position has all along been incompatible with a second reading, and at no time were its advocates able to take it from under the operation of the order in which it stood, and have it read a second time. When the court takes into consideration all these facts as shown by the record, we submit that the conclusion that the bill was not read a second time is irresistible, and that we have met successfully, even the severe and illogical presumption suggested in the decision in 25th Illinois, *supra*.

If the court will also examine the course of proceedings of the Twenty-sixth General Assembly, as found in the printed journals, it will discover that in every instance where a bill was read more than once on the same day, the following or a similar entry appears:

"On motion of Mr. ——, the rule was unanimously dispensed with, the bill read a second time and referred to the committee, etc." That no attempt was ever made to dispense with the rule where any considerable opposition was manifest, and that no such attempt was made with the bill in question accords both with common sense, and this uniform proceeding as shown by the printed journal. It will not be supposed, nor will the court indulge the presumption, that the Senate, to which this bill had recently been reported, was entirely oblivious to the determined struggle which the records show had been carried on in the House in relation to this bill from the day of its introduction by the committee. The record does show that the opponents

of the bill in the Senate were alert from the date when it was reported there and watched it with ceaseless vigilance and opposed it at every step of its progress.

A legal presumption must always be reasonable. It must never be drawn from circumstances manifestly adverse to the conclusion which the presumption is intended to support.

"Whenever a question arises in a court of law of the existence of a statute or of the time when a statute took effect or of the precise term of any statute, the judges who are called upon to decide it have the right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless a positive law has enacted a different rule."

Gardner v. *The Collector*, 6th Wallace, 511.

On this point we desire to suggest also, that there is a different chain of circumstances involved in this case from that in the case in 25th Illinois. In that case the question arose as to the third reading of the bill. The record showed the roll-call on the final passage of the bill, and it passed by the requisite vote. The roll-call immediately succeeds the third reading of the bill and is practically a part of the same proceeding. The court might well presume, therefore, where the record showed this roll-call, that the third reading of the bill had been had, especially too, when as in that case, the record showed that the bill was proceeding by unanimous consent, and without any opposition whatever. If, then, the presumption which the court suggests was properly indulged in that case, it by no means follows that the same presumption should be indulged in

the case at bar, where there was an opposition determined, and sufficiently powerful to prevent the progress of a bill, except within the rules and the constitutional requirement.

We now desire to call the attention of the court to some decisions of the Supreme Court of the State of Illinois, which we maintain announce a doctrine different from that in the case upon which counsel for defendant rely, and which we contend, announce a better rule. The first case decided, involving this point, was that of *Spangler* v. *Jacoby*, 14th Ill.. page 297.

Treat, Chief Justice, in delivering the opinion of the court, uses the following language:

"The constitution contains the following language: Each house shall keep a journal of its proceedings. (Article III, Section 13.)"

"On the final passage of all bills, the vote shall be by ayes and nays, and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of all the members elect in each house."

"The journals of either branch of the legislature are the proper evidence of the action of that branch upon all matters before it. Greenleaf on Evidence, Section 490; *Root* v. *King*, 7th Cowan, 613; *Jones* v. *Randall*, Cowper, 17.

"In our opinion it is clearly competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution and thus defeat its operation."

That an act *was not* passed in the mode prescribed by the constitution can only be shown by the absence of those entries from the journal, which, if made, would affirmatively show that the bill was properly passed; and by

showing in the journal such a state of proceedings as precludes the presumption that those things which the constitution requires were actually done.

"The constitution requires each house to keep a journal, and declares that certain facts made essential to the passage of a law shall be stated therein. *If those facts are not set forth, the conclusion is that they did not transpire.* The journal is made up under the immediate direction of the House, and is presumed to contain a full and complete history of its proceedings. If a certain act receive the constitutional assent of the body, it will so appear on the face of the journal, and when a contest arises as to whether an act was thus passed, the journal may be appealed to, to settle it. It is the evidence of the action of the House, and by it the act must stand or fall. It certainly was not the intention of the framers of the constitution that the signatures of the speakers and executive should furnish conclusive evidence of the passage of a law. The presumption, indeed, is that an act thus verified became a law pursuant to the requirement of the constitution, but that presumption may be overthrown. If the journal is lost or destroyed this presumption will sustain the law, for it will be intended that the proper entry was made in the journal, but when the journal is in existence and it fails to show that the act was passed in the mode prescribed by the constitution the presumption is overcome and the act must fall."

This decision recognizes that provision of the constitution requiring each house to keep a journal of its proceedings. It further states that the journals of either branch of the legislature are proper evidence of the action of that branch upon all matters before it. If so, they are the proper evidence of the action of the Senate upon the second reading of a bill, and upon any other matter which becomes a part of the proceedings of the Senate, and as

suggested by the court, the journal is made up under the immediate direction of the House, and is presumed to contain a full and complete history of its proceedings. We submit that the journal does not contain such full and complete history of the proceedings of the Senate, as will give to a bill validity as a law when it not only fails to show that such bill was read a second time, but does show a condition of legislative proceeding clearly indicating that it was not so read. The second reading of the bill is not set forth, but on the contrary a series of facts is set forth which convince us that those not set forth "did not transpire."

Says the learned judge:

"If the journal is lost or destroyed, this presumption will sustain the law, for it will be intended that the proper entry was made upon the journal."

What entry? The entry that the bill was read a second time.

"But when the journal is in existence and it fails to show that the act was passed in the mode prescribed by the constitution, the presumption is overcome and the act must fall." Here the journal is in existence, is in evidence, and it fails to show that the act was passed in the mode prescribed by the constitution. The passage of an act in the mode prescribed by the constitution does not refer alone to the calling of the ayes and nays on the final passage of a bill and to the entry of the vote on the journal, but refers to every material step, every constitutional

journal, not only that that provision of the bill which had been stricken out in the House was no part of the law, but that the bill never became a law, because the Senate never concurred in the amendment, and so concludes simply from the absence of the proper entries on the Senate journal.

The three cases last referred to preceded the decision in 25th Illinois, already cited, and if these were all the cases touching upon this question it might be said that the doctrine clearly held in those decisions had been repudiated by the decision in 25th Illinois, *supra*. But this question has been before the court a number of times since the decision in 25th Illinois, and we maintain that the doctrine there announced has been overruled. One of the most important cases involving this question was that of *The People of the State of Illinois ex rel. Barnes* v. *Starne, Treasurer of the State of Illinois*, reported in 35th Illinois, page 121.

The case involved the validity of a published act providing for the payment of expenses incurred in the relief of sick and wounded soldiers of the State during the war, and was decided at the April term, 1864, and was at the time a case of unusual interest. In that case, speaking of the evidentiary character and force of the legislative journals, the court say:

"Were it not for the somewhat peculiar provision of our constitution which requires that all bills, before they can become laws, shall be read three several times in each house, and shall be passed by a vote of a majority of all the members elect, a bill thus signed and approved would be conclusive of its validity and binding force as a law. But this provision having been adopted to prevent improvident legislation and to prevent the enforcement of bills

that were never enacted into laws, the means of its enforcement are implied. It is true that these means are negative and not positive in their character. Whilst neither of the other coördinate branches of the government has authority to command its observance, the judicial and executive departments are not bound to enforce such bills as laws. Whilst they are *prima facie* binding, still, *when it appears from the journals that either of these constitutional requirements is wanting, the provisions of the bill will not be enforced. According to the theory of our legislation, when a bill becomes a law there must be record evidence of every material requirement from its introduction until it becomes a law, and this evidence is found upon the journals of the two houses.*"

We call the attention of the court particularly to the concluding portion of the above extract. This very clearly and correctly states the rule, and we maintain, just as clearly and correctly and necessarily overrules the decision in 25th Illinois. It will not be contended that the first and second readings of a bill are not material requirements under the constitution of 1848. If they were material requirements, then, in the language of the court, there must be record evidence that they were observed, for there must be record evidence of every material requirement from its introduction until it becomes a law. This record evidence must necessarily be of an affirmative character and consist of affirmative statements. Taken together, they comprise the history of what was done on the passage of a bill. This history is to be found upon the journals of the two houses.

Where, as in this case, the journal is silent in regard to, or contains no evidence that a material requirement of the constitution was complied with, we are unable to see how

the presumption can exist that compliance with such requirement was had. The rule announced in this case was again clearly and explicitly reasserted by our Supreme Court in the case of *Ryan* v. *Lynch et al.*, 68 Illinois, 163. After noticing the provisions of the constitution of 1848, and the law relating to the journals of the General Assembly, Justice Scholfield, in delivering the opinion of the court, said:

"These provisions are broad enough in their terms, and we have no doubt they were intended by the legislature to embrace the journals of each house of the General Assembly. The certificate in evidence conforms to the requirement of the 9th section, and was competent proof of the facts therein recited. It proves what proceedings were had in the Senate in relation to the passage of the bill, and there can be no inference that any other proceedings were had, for it is shown that all are given that relate to the subject.

"In this case, the only power and authority in law justifying the issuing of the bonds, is the act of the 18th of February, 1857, which we have seen was not read on three different days, nor was it passed by a vote by the ayes and noes in the Senate. Article III, section 21, of the Constitution of 1848, requires that upon the final passage of all bills, the vote shall be by ayes and noes, and no bill shall become a law without the concurrence of a majority of all members-elect in each House. And the 23d section of the same article requires that 'every bill shall be read on three different days in each house, unless in case of emergency, three-fourths of the house where such bill is depending shall deem it expedient to dispense with this rule.' The bill, therefore, never became a law, and the act conferred no power or authority to issue bonds. It was as completely a nullity as if it had been the act or declaration of an unauthorized assemblage of individuals."

If it be true, as the court decide in that case, that there can be no inference that any other proceedings were had

than those shown on the journal, it is certainly not the law that a presumption will exist that a material requirement of the Constitution was observed, when the journal contains no entry showing such observance, much less will it be presumed when a condition is shown strongly rebutting such observance; and as this language cannot be reconciled with the language of the court in the case in the 25th Illinois, it must be held to overrule said case.

In the *Lynch* case there was an omission in the journal of any evidence that the bill had been read a third time, or that the ayes and noes had been taken on its final passage. It will be observed in the opinion, the learned judge treats the third reading of the bill as a matter material to the case,—as a constitutional mandate that cannot be omitted, and that the failure to observe such requirement would be fatal to the law.

The *Starne* and *Lynch* cases both treat the provision of the Constitution, requiring that each house shall keep a journal of its proceedings, as mandatory and material. They both, following the reasoning in the early cases, regard the journals kept in pursuance of the constitutional requirement, as the only evidence that the material requirements of the Constitution, in regard to the passage of bills, were complied with, and we maintain that by the rule announced in these decisions, the law in this state is now well settled, that the journal must show affirmatively the compliance with every material requirement of the Constitution, and that the failure of the journal to show such compliance with any one material requirement, is fatal to the bill.

In the case of *McCullough* v. *The State*, 11 Indiana, 524, it was held that the journals of the two houses being required by the Constitution to be kept, are conclusive evidence of the facts appearing upon their face.

"*Held*, that where a bill has not been read on three several days in each house, as required by the Constitution, it would fail to become a law."

Ferguson v. *Miners' Bank*, Smeed, Tenn., 609.

We now desire to call the attention of the court both to the title and to the subject matter of House Bill 373, as it was originally introduced. While the copy of the bill was not introduced in evidence before the master, it was used in argument in the court below, and in the brief filed in said court, and we believe properly comes before this court under the stipulation in printed record, page 517. It was considered in the court below as shown in the opinion of the court, printed record, page 211.

"A bill for 'An act to enable the city of Chicago to enlarge its harbor, and to grant and to cede all the rights, title and interest of the State in and to certain lands lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of said city.

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That all the right, title and interest of the State of Illinois in and to the submerged lands and ground constituting the bottom of Lake Michigan, lying on the eastern frontage of the city of Chicago, in the said State of Illinois, as said frontage is now bounded and defined by law, for the space of one league eastwardly from the shore line of said lake, are hereby granted, ceded and conveyed to the said city of Chicago, for the uses and purposes, and subject to the conditions hereinafter mentioned.

"Sec. 2. That whenever it shall be deemed expedient by the corporate authorities of the city of Chicago to enter upon any of the lands or grounds hereby granted and ceded for the purpose of constructing docks or wharves, or enlarging the harbor accommodations of said city; and whenever the engineer, agent or proper officer of said city, and the Secretary of War of the United States, or any officer by him detailed for such purpose, shall have surveyed and agreed as to the location, plan and manner of constructing such docks, piers and break-waters, or other works as may be necessary, in their judgment, to enlarge the harbor of said city, and promote and encourage the commerce upon, and the navigation of, the said lake, the said city of Chicago is hereby authorized and empowered, in accordance with the plan or plans so agreed upon, to enter upon the said submerged lands and grounds, and build and construct any such docks, piers, break-waters or other works, or cause the same to be constructed and built: *Provided, however*, that the entrance to the Chicago river shall not be obstructed or encroached upon: *And provided, further*, that in no event shall any portion of the expense of such works be paid by the State.

"Sec. 3. The aforesaid grant and cession are made upon the express condition that the said city of Chicago shall, in no event, and upon no consideration whatever, alien, sell or convey the lands or grounds aforesaid, but the same are to be held in trust, forever, for the uses and purposes aforesaid: *Provided, however*, that the same may be leased for a period not exceeding ninety-nine years, at any one time, upon the same terms and conditions as the school lands belonging to the said city.

"Sec. 4. All the right, title and interests of the State of Illinois in and to the lands and grounds lying between the east line of Michigan Avenue and the track of the Illinois Central Railroad, whether the same be submerged or otherwise, and constituting a part of sections 10 and 15, in town 39, range 14 east of the third principal meridian, or lying and being adjacent thereto on the east, be, and the same are hereby granted and ceded to the city of Chicago:

Provided, however, that the said last grant and cession are made upon the express condition that the said last described premises shall never be alienated or conveyed by the said city, except such sale and conveyance are authorized and ratified by the votes of at least three-fourths of all the aldermen by law required to be elected, and unless the order, ordinances or resolution authorizing such sale and the ratification thereof, shall have been published in the corporation newspaper for at least thirty consecutive days immediately preceding the time of taking such vote: *And provided, also*, that the said last grant and cession are made upon the further express condition that the said city of Chicago shall never lease the premises in this section described for a longer period, at any one time, than twenty years, and which said demising or leasing shall be on terms and conditions now by law, or by regulation, order or ordinance of the common council of said city, required or imposed in letting or leasing the school lands belonging to said city: *And, provided*, that the said last grant is made upon the further condition that the said premises, or any portion thereof, shall never be leased unless the same is authorized by the common council of said city, nor shall any such lease be of any force or effect until the same shall be ratified by the votes of at least three-fourths of all the aldermen, by law required to be elected.

"Sec. 5. Nothing in this act shall be construed to prevent the city of Chicago from reserving or laying out any portion of the ground or land described in section 4, as a public park, but the same, or any portion thereof, may be so dedicated by the said city at its election.

"Sec. 6. Nothing in this act shall be construed to change or modify the jurisdiction of the courts of the United States on the waters of Lake Michigan embraced within the boundaries described in the first section of this act.

"Sec. 7. This act shall be deemed a public act, and shall be favorably construed for all the purposes herein expressed in all courts and places, and shall be in full force and effect from and after its passage, and all acts and parts of acts in conflict with this act are hereby repealed."

STATE OF ILLINOIS,
OFFICE OF SECRETARY OF STATE.

I, Isaac N. Pearson, Secretary of State of the State of Illinois, do hereby certify that the foregoing is a true, full and correct copy of House Bill No. 373, of the Twenty-sixth General Assembly of said State, entitled, "A bill for an act to enable the City of Chicago to enlarge its harbor, and to grant and to cede all the rights, title and interest of the State, in and to certain lands lying on and adjacent to the shore of Lake Michigan on the eastern frontage of said city," as the same remains on file in my office.

IN WITNESS WHEREOF I hereunto set my hand and [SEAL] affix the great seal of State, at the city of Springfield, this 27th day of September, A. D. 1892.

I. N. PEARSON,
Secretary of State.

For the purpose of comparison as heretofore suggested, we here insert in full the Lake Front Act:

"An Act in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago.

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That all right, title and interest of the State of Illinois in and to so much of fractional section fifteen (15), township thirty-nine (39), range fourteen (14) east of the third (3d) principal meridian, in the city of Chicago, county of Cook, and State of Illinois, as is situated east of Michigan avenue and north of Park Row, and south of the south line of Monroe street, and west of a line running parallel with, and four hundred feet (400) east of the west line of said Michigan avenue—being a strip of land four hundred (400) feet in width, in-

cluding said avenue, along the shore of Lake Michigan, and partially submerged by the waters of said lake, are hereby granted, in fee, to the said city of Chicago, with full power and authority to sell and convey all of said tract east of said avenue, leaving said avenue ninety (90) feet in width, in such manner and upon such terms as the common council of said city may, by ordinance, provide: *Provided*, that no sale or conveyance of said property, or any part thereof, shall be valid unless the same be approved by a vote of not less than three-fourths of all aldermen elect.

"Sec. 2. The proceeds of the sale of any and all of said lands shall be set aside, and shall constitute a fund, to be designated as the "Park Fund" of the said city of Chicago, and said fund shall be equitably distributed, by the common council, between the south division, the west division, and the north division of said city, upon the basis of the assessed value of the taxable real estate of each of said divisions, and shall be applied to the purchase and improvement, in each of said divisions, or in the vicinity thereof, of a public park, or parks, and for no other purpose whatsoever.

"Sec. 3. The right of the Illinois Central Railroad Company, under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such appropriation, occupancy, use and control in and to the lands submerged or otherwise lying east of the said line running parallel with, and four hundred (400) feet east of the west line of Michigan avenue, in fractional sections ten (10) and fifteen (15), township and range aforesaid, is hereby confirmed, and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and break-water of the Illinois Central Railroad Company for the distance of one mile, and between the south line of the south pier extended east-

wardly, and a line extended eastward from the south line of lot twenty-one (21), south of and near to the round-house and machine shops of said company, in the south division of the said city of Chicago, are hereby granted, in fee, to the said Illinois Central Railroad Company, its successors and assigns: *Provided, however*, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same; and that all gross receipts from use, profits, leases or otherwise of said lands or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per-centum provided for in its charter, in accordance with the requirements of the said charter: *And provided, also*, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation. Nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor: *And provided, further*, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate, or of such occupancy, be exempt from municipal or other taxation.

"Sec. 4. All the right and title of the State of Illinois in and to the lands, submerged or otherwise, lying north of the south line of Monroe street, and south of the south line of Randolph street, and between the east line of Michigan avenue and the track and roadway of the Illinois Central Railroad Company, and constituting parts of fractional

sections ten (10) and fifteen (15), in said township thirty-nine (39) as aforesaid, are hereby granted, in fee, to the Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company, their successors and assigns, for the erection thereon of a passenger depot, and for such other purposes as the business of said company may require: *Provided*, that upon all gross receipts of the Illinois Central Railroad Company, from leases of its interest in said grounds or improvements thereon, or other uses of the same, the per centum provided for in the charter of said company, shall forever be paid in conformity with the requirements of said charter.

"Sec. 5. In consideration of the grant to the said Illinois Central, Chicago, Burlington & Quincy, and Michigan Central Railroad Companies of the land as aforesaid, said companies are hereby required to pay to said city of Chicago the sum of eight hundred thousand dollars, to be paid in the following manner, viz: Two hundred thousand dollars within three months from and after the passage of this act; two hundred thousand dollars within six months from and after the passage of this act; two hundred thousand dollars within nine months from and after the passage of this act; two hundred thousand dollars within twelve months from and after the passage of this act; which said sums shall be placed in the park fund of the said city of Chicago, and shall be distributed in like manner as is hereinbefore provided for the distribution of the other funds which may be obtained by said city from the sale of the lands conveyed to it by this act.

"Sec. 6. The common council of said city of Chicago is hereby authorized and empowered to quit-claim and release to the Illinois Central Railroad Company, the Chicago, Burlington & Quincy Railroad Company, and Michigan Central Railroad Company, any and all claim and interest in and upon any and all of said land north of the south line of Monroe street, as aforesaid, which the said city may have by virtue of any expenditures and improvements thereon, or otherwise, and in case the said common council shall

neglect or refuse thus to quit-claim and release to said companies, as aforesaid, within four months from and after the passage of this act, then the said companies shall be discharged from all obligations to pay the balance remaining unpaid to said city.

"Sec. 7. The grants to the Illinois Central Railroad Company contained in this act are hereby declared to be upon the express condition that said Illinois Central Railroad Company shall perpetually pay into the treasury of the State of Illinois the per centum on the gross or total proceeds, receipts or income derived from said road and branches stipulated in its charter, and also the per centum on the gross receipts of said company reserved in this act.

"Sec. 8. This act shall be a public act and in force from and after its passage."

Passed over veto, 16th of April, 1869.

It will be observed that at the time of its introduction, the title was "A bill for an act to enable the city of Chicago to enlarge its harbor, and to grant and to cede all the rights, title and interest of the State in and to certain lands lying on, and adjacent to the shore of Lake Michigan on the eastern frontage of said city."

An inspection of the original bill, as above, will show that this title was a proper one for that bill. It expressed the subject of the bill, and it gave some correct idea of the manner in which that subject was to be dealt with. In other words, it gave the purpose of the bill. Provision was made in the bill for the enlargement of the harbor of the city of Chicago, and for the cession of the lands therein described.

After the first and second readings in the House, the bill was referred to a committee, from which it was reported back with amendments. Inspection of the printed

record, page 552 *et seq.*, fails to show what these amendments were, and this is only ascertained by comparison of the bill as it passed (printed record, page 634) with the bill as originally introduced.

This investigation discloses the fact, that the committee amendment consisted in striking out all after the enacting words, and inserting the bill as it was finally passed, with the exception of a few minor amendments which were adopted by the House, and which are set forth in full in the record. In other words, after having been twice read in the House, the language of the bill was completely changed and the character of the bill wholly perverted. From a bill which proposed to allow the city of Chicago to enlarge its harbor, after it had been twice read, it was changed to a bill which proposed to deprive the city of Chicago of all rights whatever in the harbor. From a bill which, in order to enable the city to do what it authorized, proposed to grant and cede to the city of Chicago certain submerged lands, it was changed to a bill which proposed to cede to the Illinois Central Railroad Company certain submerged lands, and gave, in effect, to that company the absolute ownership of all the real estate within the harbor of the city of Chicago forever—all the time during its pendency in the House, bearing the title by which it was distinguished when first introduced. Can it be said that that title was expressive either of the subject or purpose of the bill after the amendment had been adopted? *So complete was the change in the purpose, and the perversion of the objects to be accomplished by the bill, that its author made a minority report from the committee to which it*

was referred, and continued, throughout all subsequent stages of its progress, a persistent and determined opponent of the bill. For a verification of this we invite an inspection of the House journal.

By the terms of the first section of the original act, a certain area of submerged lands on the eastern frontage of the city of Chicago was to be conveyed to said city for certain uses and subject to certain conditions.

In section 2 of said act, those purposes and conditions are fully set forth and defined, by which the corporate authorities of the city of Chicago are authorized to enter upon the submerged lands or grounds for the purpose of constructing docks or wharves and enlarging the harbor accommodations of the said city, upon plans to be approved by the War Department. The grant was for the purpose of the construction of such docks, piers, breakwaters, or other works as should be necessary, in their judgment, to enlarge the harbor of the said city and encourage the commerce upon and the navigation of the said lake. The purpose for which this grant was proposed to be made by the original bill was strictly a public purpose, and the grant to the city was in trust for the uses above set forth.

By section 3 the city was deprived of the right to alien or sell any portion of said public lands so that any part of the harbor of the city of Chicago should pass into any private or exclusive ownership.

In lieu of the cession to the city in trust, as provided for in the original bill, an attempt is made—

First—To confirm in fee the title to the land occupied by the Illinois Central Railroad Company as right of way, and to grant to it all incidents of such ownership in fee.

Second—To grant and cede to the Illinois Central Railroad Company in fee, as a matter of private and exclusive ownership forever, the large area of submerged lands constituting the bed of Lake Michigan, as therein described.

The grant to the city was for the purpose of enlarging the harbor and improving the commerce of the lake, and for no other purpose. The attempt of grant to the railroad company, while it contains a faint implication of the right or purpose of the railroad company to construct thereon docks and wharves, if it constitutes a grant at all, conveys such property to the railroad company absolutely to be used for any purpose for which it may be adapted by its situation. It is difficult to imagine a more complete change or perversion of the character and objects of a bill than was made by striking out the provisions above mentioned, and inserting section 3 of the bill as amended by the committee.

II.

THE TITLE OF THE ACT.

1.

The subject of the act was not expressed in the title, as required by the constitution.

First: The constitution of Illinois, in force in 1869, when the Lake Front Act was passed, contained the following:

"Every bill shall be read on three different days in each house, unless in case of urgency, three-fourths of the house

where such bill is so depending shall deem it expedient to dispense with this rule, and every bill having passed both houses shall be signed by the speakers of their respective houses; and no private or local law which may be passed by the General Assembly shall embrace more than one subject, *and that shall be expressed in the title.*"

Const. of 1848, Art. III, Par. 23.

The well-settled construction of this provision of the constitution by the Supreme Court of Illinois, is, that the validity of the act must depend, under such a provision, *upon the title to the bill* as it passed both houses." The bill must have had a sufficient title to express the subject thereof at the time of its three several readings and passage in each house. This subject has received careful consideration by the Supreme Court of the State of Illinois, and the law relating thereto is well settled.

Binz v. *Weber*, 81 Ill. 288.

In that case the court say:

"It is urged that, because the law has a title more restrictive than that to the bill when it passed the Senate, and because this more restrictive title does not appear to have been adopted by the 'ayes and noes,' and by a majority of the members elect of each house, the law was not constitutionally adopted. A controlling consideration in adopting these constitutional provisions was to guard against inconsiderate legislation. The practice of passing bills by their titles, without being read at large in the two houses, had grown into a common practice. Bills were passed by their titles, and members, supposing the titles truly stated the provisions of the bills, voted for them without learning their provisions. In this manner vicious legislation obtained. In was to prevent this practice, in part, at least, that this constitutional provision was adopted. See *Plummer* v. *The People*, 74 Ill., 361. By giving effect to this provision, no portion of

a bill not germane to its general object, or not expressed in the title when passed through the two houses, could acquire the force of a law. Only the portions of a bill expressed in the title when passed are constitutionally adopted. This being so, it does not matter what title might be adopted after its passage to designate the law. The title adopted after the passage of the bill is no part of the law, nor does it enlarge, limit or control the law. *The title to a bill is an essential part of the bill, and under the Constitution every bill must have a title, and such title must truly state the object of the bill.* Under this constitutional requirement, then, we must look to the title of this bill *as it passed each house, and not to the title of the act after its adoption*, to learn what portion of its provisions are constitutional. By thus applying these provisions to the passage of laws, we have no doubt we shall effectuate the intention of the framers of that instrument. In *Larrison v. Peoria, Atlanta and Decatur Railroad Co.*, 77 Ill., 11, it was said that a title to a *bill* was not essential, but on further argument and reflection we are satisfied that we were wrong, as the Constitution has made it indispensable, and that opinion in that respect must be modified; and it is not necessary at this time to consider whether a title to an *act* is essential. When the journals are not resorted to for the purpose of showing by what title a bill is passed, we will presume that it passed by the title to the act, and its operation and title will be governed thereby."

Under this decision it is clear that the bill must have an appropriate title during its passage through both Houses; that if it has no such title during its passage through the House, the House, after its passage, can not give it an appropriate title, and make such a change of title relate back to the introduction of the bill. As was said in that case, the constitutional restriction requiring that the subject of a bill shall be expressed in the title was made to guard against inconsiderate legislation, and to destroy the

vicious practice of passing bills with false or misleading titles; such being the declared object of the constitutional provision, the courts will give it such operation as will effectuate that object.

Applying the doctrine of this decision to the Lake Front Act, that act stands before the court the same as though it had passed the House of Representatives without any title whatever, and in such case we cannot see how it can be seriously contended that it is a valid law. While it is within the power of either House of the General Assembly to change the title of a bill after its passage, by an appropriate amendment, germane to the original title and the subject of the bill, that power can only be exercised where the title originally was an appropriate one. It cannot be exercised to the extent of giving to a bill an entirely new and different title, and one expressive of wholly different subject matter from that expressed in the original title.

In this case the titles are as wholly different from each other. and express as wholly different subject matter and purposes, as the two bills to which they related, even if it can be said that the last title expresses the subject matter of the bill at all.

"In the case of *Binz* v. *Weber*, 81 Ill., 280, in passing upon a similar provision of the Constitution of 1848, applicable to private laws, we said that the validity of the act must depend, under such a provision, upon the title to the bill as it passed both houses, and not on the title to the law after its adoption. * * * Is then the title by which the bill passed sufficient to sustain the law? The title as the bill passed the Senate was 'A bill for an act to revise the law in relation to licenses.' For the bill with this title 29 Senators voted, and 11 against. After the bill had so passed

the Senate, on motion the title was changed so as to read 'A bill for an act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors'. The change in the title was adopted by ayes 24, nays 11. As thus amended, the bill was sent to the House, where it was constitutionally passed through that body, with the title as amended in the Senate, and was returned to that body, and all the requisite subsequent steps were taken for it to become a law. * * * It may be that licenses to sell liquor were not specifically named in the title, but it was undoubtedly so expressed as to call the attention of every Senator to the subject matter of the bill, and we have no doubt that this general expression of the subject of the bill answers the constitutional requirement. * * *

"This title called attention to the chapter regulating license, and that chapter provided for the licensing of saloons, and as all the law on the subject was then only found under the title of that chapter, we presume every member of the Senate knew by the title that the bill proposed to revise that chapter, and in doing so that it would almost necessarily affect liquor licenses."

Johnson v. *The People*, 83 Ill. 431.

The bill in question did not have an appropriate title during its passage through the House of Representatives, and it is not competent for the House, by an order such as is expressed in the record in this case, to change and give to the bill an entirely new and different title from that which it bore during its pendency in the House.

It will not be contended now by any advocate of the bill that the title which it bore when introduced, and which it carried through every stage of its proceedings in the House, was an appropriate title, that it expressed the subject of the act after amendment by the House, or that it gave to any one a correct idea of the purpose of the bill.

Let us apply the principles thus announced to the present case.

It is important to inquire whether the title of the bill under which it received its three several readings in the House of Representatives, and under which it was there passed on its third reading, fairly expressed the subject of the bill.

That title was specific and referred to a distinct, specific and particular subject matter, namely: "To enable the city of Chicago to enlarge its harbor and to grant and to cede certain lands." The title as changed neither embraced, enlarged or referred to any of the matter expressed in the original title.

The leading subject there expressed in the title was: "An act to *enable the city of Chicago to enlarge its harbor*," and as incident to that purpose the grant of submerged lands was added.

During all the three readings in the House, the bill bore no other title than this, nor was there any other subject expressed or purpose indicated by the title. On its first and second reading it cannot be denied that the subject of the bill was properly expressed in the title, and the legislator was truthfully informed of the purpose of the bill as contemplated by the constitution. But it inevitably follows that after the bill was amended, by striking out all after the enacting clause, and eliminating from it everything purporting to give to the city of Chicago power to enlarge its harbor, the title did not express the subject of the bill, nor convey to the legislative mind or to the public, any correct idea of the purpose of the proposed legisla-

tion. After the adoption of the committee amendment, it became a bill to enable the Illinois Central Railroad Company to own the harbor and improve it at will. The title of the bill, at its third reading and passage, not only failed to express this subject but was actually misleading and deceptive as to the real subject of the bill. This cannot be fairly questioned.

The People v. *Com. of Highways*, 53 Barb. 70.
Plummer v. *The People*, 74 Ill. 361.
The People ex rel. v. *The Inst. of Protestant Deaconesses*, 71 Ill. 229.

It appears, in the case last cited, that on March 7, 1867, the General Assembly of Illinois passed an act entitled, "An act to incorporate the Institution of Protestant Deaconesses, and to provide for the management and control of an hospital *in Chicago*." The body of the act not only made provision for the maintenance of such an hospital in Chicago, but contained provisions sufficiently broad, when considered independently of the title, to authorize the exercise of like power at any place in the State. The question presented to the court was whether the institution had the right, under said charter, to exercise the privileges and franchises granted, and to establish and maintain an orphan asylum in the city of Jacksonville, in the county of Morgan, in this State.

In the decision of this question the Supreme Court of Illinois say:

"The Constitution of the State, at the time the act was passed, provided that 'no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title.' Should

the act be held to grant the power to establish and maintain an orphan house, an insane asylum, or a school for the education of youth, in Jacksonville, or in any other place in the State, outside of Chicago, it would seem to be liable to the constitutional objection that it embraces more than one subject, and that not expressed in the title. The purpose of the constitutional provision was, that such a private or local act should not only embrace but one subject, *but that the title to the act should afford some information of the subject of it.* The information which would naturally be conveyed by the title of this act would be, that the subject was one local to Chicago, and that the operation of the enactment would be confined within the corporate limits of that city. * * *

If the construction which the appellee would put upon this charter, that it empowers the corporation to establish and maintain orphan houses, insane asylums, and schools for the education of youth, at any place within the State, be the true one, then the title, as indicative of the subject of the act, would have been deceptive, and as we would view it, would be in fraud of the constitutional provision."

For stronger reasons should the title of a bill, which purported to enable the city of Chicago to enlarge its harbor, be held to be fraudulent and deceptive, and not to express the subject of a bill, the body of which was designed to deprive the city of that power, and confer the same upon a private railroad corporation. If the contention of the learned counsel for the railroad company as presented in the court below is sustained, the bill as it had been amended, and was passed, enabled the Illinois Central Railroad Company, (and not the city of Chicago) to own and improve the harbor of the city of Chicago; and to that end granted to the railroad company (instead of the city) the submerged lands in question. The title of the bill was for "An act to enable the city of Chicago to improve its har-

bor," etc. The counsel for the railroad company insist that the body of the bill, as it had been amended, was designed to confer that power on the Illinois Central Railroad Company.

Had the bill as amended passed the General Assembly, and become a law still bearing the title which it had at the time it was introduced it could not be seriously contended that its title was in compliance with the constitutional requirements, or that the act was not fatally defective and invalid for want of such compliance. Court and counsel will search said act in vain for a single clause or sentence in furtherance of or in consonance with the primary purpose expressed in said title, viz: "To enable the city of Chicago to enlarge its harbor."

If the act would have been invalid on its final passage and enrollment with that title, false and misleading as it was, then we insist, that under the forgoing decisions of the Supreme Court of the State, it was fatally defective, by reason of the false title it bore at each and all its readings in the House.

If the title borne by the bill while it was pending in the House was expressive of the subject of the proposed act, and properly apprised legislators and the public of the purpose of the act, then we submit there was no necessity for the complete change of title which was made, resulting in the adoption of one which, covering the purposes of the bill, like the bill itself, omitted every element of the primary subject and purpose of the original bill and its title. In this sweeping change the General Assembly confessed that the original title was not *expressive* within the constitu-

tional requirement, and this confession is fatal to the law.

The title which the bill bore until after its final passage in the House, was deceptive, and a deceptive title is in fraud of the constitutional provision.

The People v. *The Institution of Protestant Deaconesses, supra.*

In the case of *The People* v. *Commissioners of Palatine*, 53 Barb., 70, it was held that when the object and subject of an act of the legislature was to authorize and direct the commissioners of highways of a specified town to reduce a road there of the width of four rods and for the distance of one mile, to the width of three rods, and the title of the act was "An act to regulate a road in the town of Palatine, in Montgomery county," the subject would not be expressed in its title, and that title was an attempted fraud upon the public rights, and was null and void.

We do not deny the power of either branch of the General Assembly in which a bill may be pending to amend its title, so only that the original, as well as the amended title, each fairly express the subject of the bill. But we do insist that under this provision of the State Constitution, as construed by the Supreme Court of Illinois, every bill for a private or local law during its pendency in each house, and at the time of the three several readings and passage in each house, must have a title which fairly expresses the subject of the bill. And when as in this instance, the journals show that the title of the bill, as it passed either house, was substantially defective—not to say fraudulent and deceptive—the same was not constitutionally passed, and never became a law.

2.

"No private or local law which shall be passed by the General Assembly, shall embrace more than one subject, and that shall be expressed in the title."

Constitution of 1848, Article III, Section 23.

The act in question was both private and local.

First. So far as it affected the principal defendant, it was an act solely for the benefit of a private corporation, and related, with reference to property on which it operated, to certain lands located in the county of Cook.

The fact that the General Assembly in the last section of the so-called act declared it to be a public act did not make it such. Whether it was a public or private act depended entirely on its character, and not on what the General Assembly declared it to be. On this point the law is well settled.

Reed et al. v. *The People ex rel.* 125 Ill. 592.

Under the constitution in force at the time, the title must have been expressive of the subject of the act. It must have been such an expression of the subject of the act as would convey to the ordinary understanding some knowledge of what the purpose of the act was. We readily recognize the distinction between the subject of an act and the purpose of the act. The subject or subject matter of an act should be so expressed in the title as to give some idea of the actual subject matter dealt with which constitutes the purpose of the act.

Would a title, "To enable the city of Chicago to enlarge its harbor," convey to any one the idea that it was the intention of the act to increase the corporate powers of the Illinois Central Railroad Company?

Or to be more liberal, would a title for "An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan on the eastern frontage of the city of Chicago" convey any idea that the primary and essential purpose of the act was to enlarge the corporate powers of said railroad company, by so amending its charter as to enable it to own and improve a harbor for general commerce, to construct and manage docks, wharves and piers, to own, improve and lease for profit large tracts of real estate?

Where the provisions of an act relate to and contemplate the formation of, and the continuous management of corporations, "An act concerning corporations" would be an appropriate title.

Where an act defines the several grades and kinds of crime, and provides for the trial of the accused and punishment for violations of the law, "An act to revise the law in relation to criminal jurisprudence" is a proper title.

Where an act relates to the revenue, exemptions, and levy and collection of taxes, and to the details thereof, "An act for the assessment of property, and for the levy and collection of taxes," is a proper title.

These have all been recognized in our legislation, but each of these contemplates a continuous dealing with a single subject matter of legislation. There is a continuing purpose to be accomplished, in the execution of which the force of the statute is continually operative and is never exhausted, and all the incidents and details are subordinate and auxiliary to the general purpose of the act.

Second. The subject of the extension of the corporate powers and franchises of the Illinois Central Railroad Company is not embraced within, or germane to, the subject expressed in the title of that act as it finally passed. That title is as follows: "An Act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago." App.

It is manifest that the subject of an extension of the corporate powers of the Illinois Central, or any other railroad company, is not even suggested in this title, nor is it in any wise germane to the subject there expressed.

The Constitution of 1848, Art. III, Sec. 23, contained this provision: "No *private* or *local law* which may be passed by the General Assembly shall embrace more than one subject, and that shall be *expres ed* in the title."

That the act of April 16, 1869, is a local law, cannot be seriously questioned.

North Chi. City Ry. Co. v. *Lake View*, 105 Ill. 208, 213.

Devine v. *Cook County*, 84 Ill. 590.

If this act is construed as making a grant of lands to, or conferring new corporate powers upon, this railway company, it is also a private act. Declaring the same to be a public act does not make it so in a constitutional sense. Such a declaration merely obviates the necessity of pleading, or making formal proof of the act, in order to claim the benefit thereof.

Belleville, etc., R. R. Co. v. *Gregory*, 15 Ill. 20.

Reed et. al. v. *The People ex. rel. Hunt*, 125 Ill. 592.

That the subject of an increase and extension of the corporate powers of any railroad corporation is neither expressed, nor in any wise germane to the subject expressed in the title of that act, is so obvious and clear upon the mere reading of the title, that illustration cannot make it plainer.

Nothing short of an absolute disregard of the plain requirements of the constitution, can suffice to hold that under the title of that act, the corporate powers of this railroad company could be increased and extended; and not only so, but the corporation authorized to engage in a business and vocation wholly foreign to the purposes for which it was created.

We are aware that the courts have been extremely liberal in holding that the general subject expressed in the title of an act would embrace all the details and subordinate provisions of the act, inserted to carry out the general purpose of the act expressed in the title, so long as the same were *properly germane thereto;* but no case has ever gone to the extent of holding that the title of an act relating to a tract of land could be held broad enough to transform a railroad corporation into a dock and wharfage company, with power to acquire title to the land in question, underlying the navigable waters of a great lake, and authorize it to construct and maintain thereon wharves, docks and piers, and use and operate the same, and lease the same for hire, and collect wharfage dues for the use thereof, and in short to thus control the lake commerce of a great city, and the country tributary thereto.

North Chicago City Ry. Co. v. *Lake View*, 105 Ill. 207.

People ex rel. v. *Prot. Deaconesses*, 71 Ill. 229.

Third. There is nothing contained in the body of the act of April 16, 1869, which purports to extend or increase the corporate powers of the Illinois Central Railroad Company.

The utmost that can fairly be claimed is that the act assumes, or takes it for granted, that the corporation already possesses, or will thereafter acquire, the corporate power or franchise to hold title to the submerged lands referred to; and to build and maintain docks and wharves thereon, and lease the same and collect wharfage dues for the use thereof.

While the act does not in terms confer upon the Illinois Central Railroad Company, the corporate power or franchise to erect and maintain docks and wharves in the Chicago harbor, and to collect wharfage dues for the use thereof, it does contain a proviso: "that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assembly which may hereafter be passed regulating the rates of wharfage and dockage to be charged in said harbor."

Will provisos of this character, which in their terms do not confer but only purport to restrain and limit the exercise of certain corporate powers and franchises, be construed as a substantive grant of such powers and franchises by implication?

Will the last clause of the third section providing that the property, when leased, shall not be exempt from municipal taxation, confer the power and franchise to acquire and hold property and lease the same for general business purposes?

We insist that it cannot be so held consistently with the rules and principles applicable to the construction of legislative grants of corporate privileges and franchises

In *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How. 435, it was said:

"The rules of construction in cases of this kind, have been well settled by this court. The grant of privileges and exceptions to a corporation are strictly construed against the corporation and in favor of the public. Nothing passes but what is granted in clear and explicit terms." * * * * "Nor does the rule rest merely on the authority of adjudged cases. It is founded in principle and necessary for the safety and well-being of every State in the union; for it is a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of * * * railroad or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter; and they are often passed by the legislature in the last days of its session, when, from the very nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called to act.

"On the other hand, those who accept the charter have abundant time to examine and consider its provisions before they invest their money."

Again: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in un-

mistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Fertilizing Co. v. *Hyde Park*, 97 U. S., 666.

Charles River Bridge v. *Warren Bridge*, 11 Pet. 420, 547.

Ruggles v. *Illinois*, 108 U. S. 527, 531.

Christ Church v. *Philadelphia*, 24 Haw. 301.

Tucker v. *Ferguson*, 22 Wall. 527.

West Wis. R. R. Co. v. *Board of Supervisors*, 93 U. S. 595.

Green's Brice's Ultra Vires (Ed. of 1880), p. 62. Note (A.)

Wood's Field on Law of Corp., p. 67, Sec. 47.

The promoters of this scheme, contained in the Lake Front Act of April 16, 1869, came to the legislature with a bill containing no provision purporting to extend or enlarge the corporate powers of this or any other railroad company. The title, as we have seen, contains no suggestion of any such subject.

With an apparent generosity, almost prodigal in its character, they inserted in the body of their bill a clause binding the Illinois Central Railroad Company to pay into the State treasury as taxes, seven per cent. of its gross earnings. It must be confessed that our admiration for this sudden burst of generosity is somewhat abated when we reflect that the company was already bound to do this by its original charter. It is also true, that by the terms of this bill the Illinois Central Railroad Company acknowledged itself under obligations to submit to legislative con-

trol, in respect to the rates of wharfage dues; but it is equally true that this corporation had no power to impose and collect any wharfage dues whatever.

It now turns out that while apparently making concessions and imposing limitations upon the corporation in the exercise of its powers, the real and hidden purpose was to enlarge its powers by implication, and thus transform this railroad corporation into a wharf and dock company, having the monopoly of the harbor of the city of Chicago, on Lake Michigan.

We insist that the Illinois Central Railroad Company acquired no power, *by mere implication*, to carry on any business or do any act which does not properly pertain to the construction, maintenance and operation of that railroad.

"In construing corporate grants, it is uniformly held *that the corporate powers are restricted by the nature and objects of the institution*, and will not in this respect extend beyond the letter or spirit of the grant or statute. They can lawfully exercise no powers except such as are expressly conferred, or such as are necessary to the performance of corporate duties *in the accomplishment of the purposes and objects for which the body was incorporated.* An attempt to exercise powers beyond this would be *ultra vires* and void."

Wood's Field on Corporations, Sec. 47, p. 67.

Vandall v. *San Francisco Dock Co.*, 40 Cal., 83.

To hold that the Illinois Central Railroad Company was, by mere *implication*, transformed into a wharf and dock company, would be in direct contravention of this principle, and utterly subversive of the strict rules of construction properly applicable to public grants of corporate franchises.

Green's Brice's Ultra Vires (Ed. of 1875), p. 29 and note.

Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication, and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted and thus accomplish the primary or principal objects of their creation, and for no other purpose. An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted and not one that has some slight or remote relation to it.

The People ex rel. v. *The Chicago Gas Trust Co.*, 130 Ill. 268.

The original purpose for which the Illinois Central Railroad Company was chartered, was to build and operate a railroad. It took with the powers thus specifically granted such implied powers as are necessary to enable it to successfully accomplish this purpose, and no other. It took no power to own and improve a harbor and exercise all the powers incidental thereto, nor can it exercise such powers without an amendment to its charter.

III.

THE ILLINOIS CENTRAL RAILROAD COMPANY HAS NO POWER TO HOLD THESE SUBMERGED LANDS.

1. *As to the proper corporate powers of the Illinois Central Railroad Company.*

This company was organized under "An act to incorporate the Illinois Central Railroad Company" of February 10, 1851.

Private Laws of 1851, p. 61.

(Printed Record, p. 611.)

The first section of this act, after providing for the formation of a corporation by the name "Illinois Central Railroad Company," concludes thus:

"And by their said corporate name and style shall be capable in law of contracting and being contracted with; shall be and are hereby invested with all the powers, privileges, immunities and franchises, and of acquiring by purchase or otherwise, and of holding and conveying real and personal estate, *which may be needful to carry into effect fully the purposes and objects of this act.*"

The "purposes and objects" of the corporation are more fully expressed in the second and third sections of the act, as follows:

"Sec. 2. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan canal to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan; and also a branch via the city of Galena, to a point on the Mississippi river opposite the town of Dubuque, in the State of Iowa."

"Sec. 3. The said corporation shall have a right of way over, and may appropriate to its sole use and control, *for the purposes contemplated herein*, land, not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use, all and singular, any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn outs, engine houses, shops and other buildings *necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road.* All such lands, waters, materials and privileges belonging to the State, are hereby

granted to said corporation *for said purposes;* but when owned by other parties the same may be obtained by condemnation," etc.

2 Purple's Statutes, p. 1354.

The 8th section of the act contains this provision:

"Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city." Id. p. 1356.

"Sec. 14. Said corporation shall, within a reasonable time after said road and branches shall have been located, cause to be made a map and profile thereof, and of the land taken and obtained for the use of such road and branches, and file the same in the office of the Secretary of State, and also like maps of the parts thereof, located in the different counties through which the same may pass, and cause the same to be recorded in the office for recording deeds, in the county in which said parts of said road and branches shall lie."

"Sec. 15. For the purpose of securing the construction of said road and branches, the right of way and all lands which may be selected along the lines of said railroad and branches within this State, under the grant made by the Government of the United States to the State of Illinois, by virtue of an act granting the right of way, and making a grant of land to the States of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile, passed September 20, 1850; and also the right of way which the State of Illinois has heretofore obtained along and on the line of said railroad and branches, as heretofore located and surveyed, for the uses of the same, as well as the lot of ground obtained by the State within the city of Cairo, for a depot, and all grading, embankments, excavations, surveys, works, materials, personal property, profiles, plats and papers, constructed, procured, furnished and done by or on behalf of the State of Illinois, for or on account of said road and branches, also the right of way over and through lands owned by the State, are hereby ceded and granted to said corpora-

tion *for the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches, as in this act provided,* and in the manner following, that is to say: * * * The said Governor of the State of Illinois shall be in his official capacity, and on behalf of the State of Illinois, and under the great seal thereof, execute and deliver to the said company a deed, in fee simple of all said lands granted by the Government of the United States under the act of Congress aforesaid, said depot lot at Cairo, right of way, grading, embankment, excavation, surveys, work, materials, profiles, plats and papers, hereinafter described and set forth, in any way appertaining to said road and branches: *Provided*, that said company shall simultaneously with the execution of said deed by said Governor, execute a deed of trust to the persons and for the purposes hereinafter named and expressed." Id. pp. 1358–9.

"Sec. 18. In consideration of the grants, privileges and franchises herein conferred upon said company shall, on the first Mondays of December and June, in each year, pay into the treasury of the State of Illinois five per centum on the gross or total proceeds, receipts or income derived from said road and branches for the six months then next preceding."

"Sec. 22. Whenever the taxes levied for State purposes shall exceed three-fourths of one per centum per annum, such excess shall be deducted from the gross proceeds or income herein required to be paid by said corporation to the State, and the said corporation is hereby exempted from all taxation of every kind, except as herein provided for. The revenue arising from said taxation, and the said five per cent. of gross or total proceeds, receipts or income aforesaid, shall be paid into the State treasury, in money, and applied to the payment of interest paying State indebtedness, until the extinction thereof: *Provided*, in case the five per cent. provided to be paid into the State treasury, and the State taxes to be paid by the corporation, do not amount to seven per cent. of gross or total proceeds, receipts or income, then the said company shall pay into the State treasury the difference, *so as to make the*

whole amount paid equal at least to seven per cent. of the gross receipts of said corporation. Id., pp. 1362, 1363. Printed record pp. 611–623.

From these provisions of the charter of the Illinois Central Company, the following points are clearly deducible, and we urge them here:

1. That the corporation was only authorized to acquire and hold the title to real estate, to the extent that the same might be needful to fully carry into effect the purposes and objects for which the corporation was created, and no other.

2. These "objects and purposes" are declared to be "to survey, locate, construct, complete, alter, maintain and operate a railroad with one or more tracks or lines of rails" between the points specified in the second section of the act.

3. The corporation has the right to acquire title to and use a "right of way" along its entire line not exceeding 200 feet in width; also the necessary land "for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnout, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of *said road.*"

4. That while the company was authorized to acquire and hold the right of way and necessary land for side tracks, depot grounds etc., for the convenient use and operation of the *Illinois Central Railroad*, it was not authorized to acquire and hold right of way, sidetracks and

depot grounds not needed for the operation of that railroad, but to be leased and used by other railroad corporations, in addition to those required for the use of the Illinois Central Railroad.

In the matter of Swigert, 19 Ill. 83.

5. The company was not authorized or empowered to take and hold the title to real estate which it did not need, and, in the very nature of things, could not use in the construction, maintenance or operation of the road; and for this reason it was clearly not authorized to acquire title to and hold submerged lands under the navigable waters of Lake Michigan, which could not, consistently with the public rights of navigation, be used for the maintenance and operation of the railroad.

I. C. R. R. Co. v. *The People ex rel.*, 119 Ill. 137.

6. The construction, maintenance, use and leasing for hire of grain warehouses or elevators and lumber yards, or the collection of wharfage dues for the use of docks, wharves and piers, upon or in connection with the navigable waters of Lake Michigan, is not embraced within the objects and purposes for which the corporation was created, and is unauthorized by the charter.

Ill. Cen. R. R. Co. v. *The People*, ex *rel.*, 119 Ill. 137.

7. The corporation was required to pay into the State treasury an amount of taxes "equal at least to seven per cent. of the gross receipts of said corporation," upon all business which it was authorized to carry on, and from all property it was authorized to own, and it was exempted from all other taxation.

"The modern doctrine is, to consider corporations as having such powers as are specifically granted by the act of incorporation, or necessary for the purpose of carrying into effect the powers *expressly granted, and as not having any other.*"

Green's Brice's Ultra Vires (Ed. of 1875), p. 29, and authorities cited in note.

Bank of Augusta v. *Earle*, 13 Pet. 587.

By the terms of its charter, said company was created a corporation for the purpose of constructing and operating a railroad on the lines and between the termini therein mentioned. It took by its charter such powers as were necessary to enable it to effectuate the objects of its creation and no other. So far as its power to hold and acquire real estate is involved, those powers and the objects and purpose of their exercise, are quite specifically set forth. They are ample for all purposes for the construction and operation of a railroad. Where this is the case, no additional power on that behalf will be implied.

By its charter a grant was made to this railroad company of a large quantity of public lands, which, through the munificence of Congress, had been given to the State of Illinois for the purpose of aiding in the construction of such railroad. But even these lands were taken and held by the company for this purpose alone, and by the express provisions of its charter it was compelled to dispose of them within a given time after the completion of the road, and had no power to hold them in perpetuity or to use them for any purpose whatever.

We believe it is not contended by counsel for the railroad company, that by virtue of its charter alone it had

the power to acquire and hold a thousand acres of land, submerged or otherwise, unless such lands were necessary for the construction and successful operation of the railroad as such. If, then, such power did not originally exist, it can only be given to the railroad company by an amendment to its charter conferring additional corporate rights. No such amendment appears on the record nor is there any pretense that any such amendment has ever been made by the General Assembly of this State, unless the so-called Lake Front Act is construed to be an amendment to the charter of the railroad company.

"The established general rule is that a corporation has no power except those which are given by its act of incorporation, either expressly or by implication as being incidental to its existence and its express powers."

Beatty v. *Knowles*, 4 Pet. 152.

Perrine v. *Chesapeake, etc., Canal Co.*, 9 How. 172.

Huntington v. *Savings Bank*, 96 U. S. 388.

Fertilizing Co. v. *Hyde Park*, 97 U. S. 659.

Scovill v. *Thayer*, 105 U. S. 143.

The People, ex rel. v. *The Chicago Gas Trust Co.*, 130 Ill. 268.

"The general doctrine is that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. What is fairly implied is as much granted as what is clearly expressed. But this being understood, it remains that the charter of a corporation is the measure of its powers and that the grant of certain powers implies the exclusion of all others."

Thomas v. *Railroad Company*, 101 U. S. 71.

"It is a principle everywhere recognized, that a corporation, public or private, possesses and can exercise no other powers than those specifically conferred by the act creating

it, or such as are incidental or necessary to carry into effect the purposes for which it was created. *Trustees* v. *McConnell*, 12 Ill. 140; 2 Kent Com. 298; *McIntire* v. *Preston*, 5 Gilm. 60; *Firemen's Ins. Co.* v. *Ely*, 2 Cow. 709; Ang. & A. on Corp. 85."

Caldwell v. *City of Alton*, 33 Ill. 418.

"A railroad corporation organized only with powers to own and operate a railroad, and to possess such lands and property as may be necessary for the transaction of its business, does not have the power to acquire or hold title to lands for farming or speculative purposes, and the court will not aid such railroad company to enforce a contract or agreement for acquiring title to such lands."

Opinion by Justice Harlan in the case of *Timothy* v. *Kely*, cited in *Farmers' Loan & Trust Company* v. *Green Bay & Minnesota Railroad Company*, 12 Federal Reporter, page 773.

This railroad company might acquire, through condemnation, all the lands necessary for the operation of its road. What it can thus acquire it might also acquire and hold by purchase and voluntary grant and the converse of this proposition is also evident, that what it cannot acquire for such necessary corporate purposes by condemnation, it can not take and hold by purchase from a voluntary grantor. It is not necessary to argue that the company cannot acquire, by condemnation, title to this vast area of more than one thousand acres of submerged lands, constituting the bed of Lake Michigan, and described in the so-called Lake Front Act.

"We held in the *Illinois Central Railroad Company* v. *Irwin*, 72 Ill. 411, that the taxes, from the payment of which the Legislature intended to relieve appellant, by this section, are only such as it, as a railroad corporation, would other-

wise be liable to pay upon its property acquired in the prosecution of its business in constructing and operating the lines of railway described in its charter. That freight houses, elevators, etc., con tructed and used solely for the purpose of enabling it to perform its duty as a common carrier are exempt from taxation, we think is beyond question. But the company has no more authority under its charter to enter upon the business of warehousing generally than it has to enter upon that of merchandising and the property, therefore, devoted to such a use, not being in the contemplation of its charter, cannot be within the exemption."

Illinois Central Railroad Company v. *The People ex rel. Hodges, Collector*, 119 Ill. 137.

The same doctrine was upheld by the court *in re Swigert, Auditor of Public Accounts*, 119 Ill. 83.

Those cases involved the question of exemption from taxation of an elevator situated in the city of Cairo, and owned by the defendant railroad company. The decision of the court is that the owning and leasing of elevators, as in this case, not being within the contemplation of the charter purpose of the corporation, such property was not exempt under the charter.

The question of the right to own the property was not involved, but clearly from the reasoning of the court, if such question had been involved in the case, the decision must have been against the railroad company.

2.

Was said act, even if properly passed, an amendment to the charter of the railroad company?

Had it been the intention of the General Assembly to make this act an amendment to the charter of the Illinois Central Railroad Company, then, under the constitution, it was

necessary that that subject should be expressed in the title.

It nowhere, either in the title or the body of the act, proposes to amend the charter of the Illinois Central Railroad Company. It contains no statement in any way amending said charter or conferring upon said company any additional corporate franchises or corporate rights, or investing it with any new corporate powers. Clearly, then, it can only be held to operate as an amendment to the charter of the railroad company by implication.

But we confidently insist that the charter of this railroad company can not be amended by implication. An amendment strongly in derogation of public right, such as this clearly would be, if held to be an amendment at all, will not be allowed by implication.

Furthermore, if an amendment, it endows the corporation with new corporate powers and functions, and imposes upon it new responsibilities, and such an amendment can only be made by the consent of the stockholders. No such consent was had, nor is it contemplated by the act. While the grant contained is supposedly of great value, no one could say how far its acceptance and management would jeopardize and imperil the interests of the stockholders, and the latter can not be subjected to this risk without their consent.

If the theory of amendment by implication could be indulged, what would such implication involve?

For a period of seventy years, extending from the organization of our State Government down to the present time, the public policy of this State, as manifested by its legislation and by the decisions of the courts, has been one

of uniform refusal to permit large corporate holdings of real estate. The right of corporations, either educational, charitable, religious, or for profit, to acquire and hold real estate, has been strictly guarded and closely circumscribed.

Corporate holding of real estate, creating a system of perpetuity therein, has ever been regarded as hostile to the homestead system, to the idea of descent and distribution of lands which has been the cherished policy of the State during its entire history. For the full discussion of this subject, we call the attention of the court to the decision of the Supreme Court of this State in the case of *Carroll* v. *The City of East St. Louis,* 67 Illinois, 568.

The opinion contains a learned and exhaustive review of the real estate policy of the State, well worthy of consideration in this connection. The opinion being by the late Justice Walker, who, by a long period of personal and judicial familiarity with our public policy, had become profoundly learned therein.

This decision was reviewed at length by the U. S. Supreme Court in the case of *Christian Union* v. *Yount,* 101 U. S. 357.

In that case in delivering the opinion of the court, Mr. Justice Harlan said:

"In *Carroll* v. *City of East St. Louis,* the question was whether the Connecticut Land Company, a corporation created in another State for the sole purpose of buying and selling lands, had power to purchase and hold title to lands in the State of Illinois. The decision was that it could not for the reason—and no other is assigned—that the company, if permitted to exercise its functions in Illinois to the full extent authorized by its charter, could acquire lands

without limit as to quantity and hold them in perpetuity; that such privilege had never been accorded by Illinois to her own domestic corporations and was inconsistent with her settled public policy against perpetuities as indicated, not by express enactment, but with absolute certainty by the general course of its legislation from the very organization of the State."

Further along in the same opinion the court recognize the fundamental principle enunciated in the Carroll case, viz: "That corporations can not acquire lands in Illinois in large quantities to be held or which may be held in perpetuity."

From the foregoing it will be seen that to hold, that this act by implication amends the charter of the Illinois Central Railroad Company so as to make it a capable grantee of these lands would be to give the act a construction by implication which violates the well settled public policy of the State as it has been recognized for seventy years. We readily admit that an express declaration by the legislature would be valid, no matter how far it contravened this public policy, but nothing less than an express enactment on the part of the General Assembly should have such force, and the courts will not give to a doubtful act that force by implication.

Section 3 of the Lake Front Act proposes to grant these submerged lands to the railroad company in fee forever, depriving the company, however, of the right of alienation. If this were a valid grant of those lands to a capable grantee without any limitation as to their use, undoubtedly such grantee might use such lands for any lawful purpose for which their location adapts them. It would seem to

follow, therefore, if force should be given to this act by implication, then the power to use these lands in the manner above described would also follow by implication. *In other words, by founding an implication upon an implication, power is given to the railroad company to hold and use these lands for any purpose it may deem proper.*

This implied power to so use the lands, depends wholly upon the implication as to the right to take them. But according to the well-settled rule of judicial construction, one implication will never be founded upon another, and this theory cannot be indulged. There is, in this section, an allusion to the contingency that improvements may be made on these lands, in the future, by the railroad company. There is no intimation as to the nature of such improvement. This is left entirely to conjecture. It is argued that those improvements will be such as to develop and improve the harbor of the city of Chicago. But there is nothing in the so-called act which makes this obligatory upon the company, or which provides that the improvements shall be only of that character. It is claimed that the company has the right to make improvements on these submerged lands and to use them in any way that the owner in fee of such property may do. If by this is meant the control and management of wharves and docks as adjuncts to the navigation of the lake, and the collection of dockage and wharfage, rents and fees, then it involves the exercise of corporate franchises and corporate powers nowhere found in the charter of the railroad company; of powers wholly foreign to the objects for which

said company was created. We deny the right of the railroad company to engage in this branch of business.

"Corporations cannot enter into a business other than that which they are authorized by law to do."

Pearce v. *Madison, etc., R. R. Co.*, 2 How. 441.

The nature of this corporate function will be discussed further along.

Nor can it be said that this grant gives to the grantee the naked power to hold these lands without the power to use them in any manner whatever. This would give to the act a useless signification, rendering it meaningless unless it were intended by the grant that the grantee should have only the power of excluding every one else from these lands. Such construction the court will not indulge. If, then, the act is effectual at all as a grant in fee of these lands, it is effectual practically without limit. If it amends the charter of the Illinois Central Railroad Company so as to enable it to take these lands in fee and use them, then it amends that charter also to the extent of enabling the company to use the lands for docks, wharves, piers, mills, manufactories, or any other purpose for which they are adapted, and enables the company to engage in any of such lines of business.

We submit that such construction cannot be indulged, and that the court will not give effect to a doubtful act when such consequences are involved. This vast area of submerged lands comprises every square yard of land within the government harbor of the city of Chicago. If the act constitutes a valid grant and vests the ownership in fee in the defendant railroad company, then that

company, from the date of the confirmation of this grant, has the exclusive ownership of the Chicago harbor. We do not claim that it would have the right to exclude any one from the navigation of the water within the harbor, but that it would be the owner of that property for all purposes of profit. The lake commerce of the city of Chicago must all pay tribute to one corporation, created as a common carrier by land, and for that purpose alone.

In *L. S. & M. S. Ry. Co.* v. *N. Y., Chi. & St. L. Ry. Co.*, 8 Fed. Rep. 858, Judge McKennan holds that, "The power of acquisition (of lands by purchase or condemnation) is limited by the necessary wants of the corporation," and that it is not for the directors but for the courts to determine the limitation. This is unquestionably a correct statement of the law relating to corporate powers, and it follows irresistibly, that a corporate charter will not be h ld to have been amended by implication so as to enable the corporation not only to take a large amount of real estate which by the terms of its charter it was unab'e to hold, but also as the result of such holding to engage in branches of business not within the scope of its charter powers or purposes.

In the opinion filed in this case (printed record page 210), the court admits that the effect of the act is to enlarge the powers of the Illinois Central Railroad Company, and that the enlargement is so great as to permit it to become for all practical purposes a wharf and dock company. With the greatest deference to the learning and judgment of that court, we submit that that admission ought to be fatal to the act, and it ought to be held incompetent for such an

act to accomplish such a result. Can it be held this important addition can be made to the powers of said company without amending its charter? It would seem not, and it would also seem that no such amendment would be allowed by implication.

We readily admit that it is not necessary to set forth the objects or effects of the act in its title, but we submit that no title which could have been given to this bill while it contained the provisions with which it passed, would have been effectual to confer this new power on the railroad company, unless such title had expressed, as the subject of the bill, the direct purpose to enlarge the corporate powers of the company.

As the act passed, its principal object or purpose is the enlargement of the corporate powers of the railroad company, and the grant of the submerged lands is merely auxiliary to that purpose, showing the means by which the enlargement is made, and the object on which the new power acts.

It will not be questioned that if the act purported to convey the submerged lands to an individual, the title by which it passed would be sufficient for that purpose, but it by no means follows that the same is true where the proposed grantee is a corporation. In both instances there must be a grantee capable of taking. In the first, the individual has that inherent, natural power; while in the second the corporation must be endowed with that power by law, either in its charter or an appropriate amendment thereto. The grant to an individual would in no particular enlarge his inherent or natural rights to own and

manage the property granted, or to engage in any branch of business. The grant to the corporation in this instance as admitted by the court materially enlarges not only its power to take but to manage and deal with the subject of the grant.

Again this is a grant both of property and corporate power, claimed by a corporation as against the public. In all such controversies the law is well settled that "Grants to private corporations are to be construed liberally in favor of the public and strictly against the corporation; whatever is not unequivocally granted is taken to be withheld."

St. Clair Turnpike Co. v. *The People*, 82 Ill., 174.

"The general powers of a corporate body must be restricted by the nature and objects of its institution."

Angell & Ames on Corp., Sec. 145.

"The exercise of the corporate franchise cannot be extended beyond the letter and spirit of the act of incorporation."

Beatty v. *Knowles*, 4 Pet. 162.

"The powers of a corporation organized under a legislative charter are only such as the statute confers, and the enumeration of them *implies the exclusion of all others.*"

Thomas v. *R. R. Co.*, 101, U. S. 71.

The charter of the Illinois Central Railroad Company empowered it to hold so much real estate as was necessary in carrying out the purposes for which it was created, and no more.

This additional business would in this case include the power to improve the harbor by the erection of docks, wharves and piers, and also the exercise of the additional franchise right of taking and collecting wharfage fees and

charges for the use of the wharves, docks and piers.

"The right to erect a wharf and to receive tolls for the use thereof is a franchise."

Wiswall v. *Hall*, 3 Paige, Ch. 313.

The Supreme Court of the State of Illinois has held that the exercise of corporate power to improve the Kankakee river was the exercise of a franchise.

The People ex rel. v. *Kankakee River Imp. Co.*, 103 Ill. 491.

If, by the terms of the Lake Front Act, the fee of the submerged lands is vested in the railroad company, then like any other proprietor of a fee it may do with its property what it sees fit, except that it may not make any erection thereon which will obstruct navigation. According to the construction of its counsel, it may improve the harbor, which, as we have already shown, involves the exercise of a new franchise, not granted to the company in its organic act, nor by any amendment thereto. On the other hand, as the act contains no clause devolving on the company any duty to improve the harbor, it may closely abstain from making such improvements, however much the public needs may demand them, and thus the State would abandon the trust in which it holds these lands for the benefit of all the public.

IV.

The Constitution of 1870 repealed all existing charters or grants of special privileges to corporations, which were not accepted within ten days after the new constitution took effect.

Article XI of the constitution of 1870, entitled "Corporations," contained the following:

"Sec. 1. No corporation shall be created by special laws, or its charter extended, changed or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the State, but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."

"Sec. 2. All existing charters or grants of special or exclusive privileges under which organization shall not have taken place, or *which shall not have been in operation within ten days from the time this Constitution takes effect, shall thereafter have no validity or effect whatever.*"

Constitution of 1870, Art. XI, Sections 1 and 2.

These sections of the constitution took effect August 8, 1870. Unless the grants of special privileges and corporate powers supposed to have been implied in the Lake Front Act, were accepted by the corporation, or were in operation, on or before August 18, 1870, the same never became operative.

If, as claimed by the counsel for the Illinois Central Railroad Company, the Lake Front Act, either expressly or by implication, conferred upon that company any additional corporate powers or franchises, it can not be denied that the same was a "grant of special or exclusive privileges," within the meaning of those terms, as used in Sec. 2, Art. XI, of the constitution.

This being the case, the adoption of that section operated as a withdrawal of any proposed "grant of special or exclusive privileges," which may have been contained in the Lake Front Act, and which were not accepted and put in operation by the corporation within ten days after the adoption of that constitution.

The constitution of 1870, in section 22, Art. IV, contained the following:

"The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, for * * * *

"Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village." * * *

"Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

The above prohibition of local or special laws respecting cities, towns or villages, is thus construed by the Supreme Court of Illinois:

"We are, moreover, of the opinion that since the adoption of the present constitution it is not competent for a city, town or village to adopt a local or special law, and thus make it a part of its charter, which had been enacted by the General Assembly prior to the adoption of the present constitution, but not prior to that time adopted by the city, town or village. Such laws in our opinion are, by implication, repealed by the present constitution. (*See People ex rel.* v. *Cooper*, 83 Ill. 585; *Guild* v. *Chicago*, 82 Id. 473.) The pleas do not allege an adoption of the act before the 8th of August, 1870—the date the present constitution went into force."

Hinze v. *The People ex rel.*, 92 Ill. 406, 424.

If the clause of this section prohibiting special or local laws incorporating or amending the charters of towns, cities or villages, had the effect to repeal by implication all such special acts as had not been accepted or adopted prior to the time the constitution took effect, no reason is perceived why the same construction should not be put upon the clause of the same section in reference to grants of "special or exclusive privileges, immunities or franchises"

to any "corporation, association or individual," which had not been accepted prior to the adoption of the constitution. It can not be denied that until after the acceptance or adoption of such special acts, the constitutional convention had the same power over unaccepted special acts conferring special privileges on private corporations, which it had in respect to municipal corporations. But to make assurance doubly sure, the framers of the constitution inserted in Article XI an express statement that "all existing charters or grants of special or exclusive privileges under which organization shall not have taken place, or which shall not have been in operation within ten days from the time this constitution takes effect, *shall thereafter have no validity whatever.*

Here was an express repeal of all existing, but unaccepted charters and grants of corporate powers or privileges. It is unnecessary to cite authorities in support of the proposition that the Lake Front Act did not of itself, and without the assent of the Illinois Central Railroad Company, so change or extend its corporate powers and obligations as to convert it into a harbor, dock and wharf company. We presume it will not be contended that the mere passage of this act, *ipso facto*, invested the company with any new corporate powers, which the corporation did not see fit to accept.

It is clear that the Lake Front Act did not become a contract, obligatory upon the State, until it received the assent of both the contracting parties. And, upon familiar principles, such assent must have been given before the offer was withdrawn. The grant of the submerged lands

which the act purports to make to the Illinois Central Railroad Company, could not become an effective grant until that corporation had become vested with power to take and hold the title to more than a thousand acres of such submerged lands under the navigable waters of Lake Michigan.

If it is contended that the grant of submerged land, expressed in the Lake Front Act, impliedly conferred the power on the company to take and hold the lands granted for the purpose therein expressed, then we insist, that neither the grant nor such implied acquisition of new corporate powers, could take effect until the same had been accepted by the stockholders.

"An offer of a railroad charter was made in January, 1849, by the legislature of Indiana. It was accepted in June, 1852. In November, 1851, the constitution providing that corporations other than banking should not be created by special acts went into effect. Held that the acceptance after November, 1851, was insufficient, and the corporation never came into existence."

State v. *Dawson*, 16 Ind. 40.

V.

There was no acceptance of any additional corporate powers under the Lake Front Act within the time limited by the constitution.

The constitution was adopted by vote of the people July 2, 1870, and took effect August 8, 1870, so that the ten days within which this supposed grant of corporate powers and privileges contained in the Lake Front Act, must have been accepted, expired August 18, 1870. If not accepted

and in operation by that time, the constitution declared that the same "shall thereafter have no validity or effect whatever."

Let us examine the proof upon this question of acceptance.

The evidence shows that the *Board of Directors* of the railroad company, *sitting in New York* July 6, 1870, "Resolved that this company accepts the grants under the Acts of the Legislature of Illinois at its last session, and that the president give notice thereof to the State, and that the company has commenced work upon the shore of the lake at Chicago under the grants aforesaid."

Printed record, pp. 637, 638.

And it further appears that the president of the railroad company communicated notice of this resolution to the Secretary of State, by letter dated November 17, 1870.

This letter appears to have been received by the Secretary of State and its receipt acknowledged November 18, 1870.

Id., p. 638.

At a meeting of the stockholders of the Illinois Central Railroad Company, which appears to have been held at Chicago, May 31, 1871, the following action was taken:

"The minutes of the meetings of the board of directors held since the last annual meeting of the shareholders, were submitted, and the following resolution adopted: *Resolved*, That the acts and doings, resolutions and votes of the board of directors, all and singular, are hereby ratified, approved and confirmed." Master's report, p. 118.

There is no proof of any *user* of any of the supposed corporate powers conferred by the Lake Front Act prior to August 18, 1870. Nor was any act done prior to that

date with the authority of those who had the power to accept new corporate privileges, franchises and liabilities, which can be construed as an implied acceptance. No such act is proven either by Morehouse's deposition or by his plat, Exhibit 11. The plat shows that none of the piers or wharves were built between April 16, 1869, and August 18, 1870. It will not be contended that the resolution adopted by the board of directors in New York is proof of any fact recited in it.

The question then arises, whether the resolution adopted by the board of directors of the company at its meeting *held in New York* July 6, 1870, together with the letter of the president of the company, addressed to the Secretary of State, dated November 17, 1870, and the action of the meeting of the stockholders held in Chicago, May 31, 1871, before mentioned, show a valid acceptance of the supposed new corporate powers prior to August 18, 1870.

This question must be answered in the negative, unless the resolution adopted by the board of directors at its meeting in New York, held July 6, 1870, was of itself a valid acceptance obligatory upon both the corporation and the State.

We insist:

First. That the acceptance by a corporation of new or additional corporate powers, privileges or franchises, is a corporate act of such nature that the same can not be performed outside of a State, or beyond the jurisdiction of the sovereignty granting the same.

Second. That it is not within the powers of a board of directors of a corporation to accept in behalf of the cor-

poration a grant of new or additional corporate powers and liabilities. The board of directors may *exercise the corporate powers conferred upon them by the charter under which they are acting*, but cannot without the assent of the corporation or stockholders, consent to a change in the organic law of the corporation.

Both these propositions are fully sustained by the authorities. If either can be maintained, the action of the board of directors in New York must stand for naught. The board of directors cannot change the character of the corporation.

The law upon the question first suggested is briefly summarized by the learned editor of Green's Brice's *Ultra Vires*, in his note (a), page 442, of the edition of 1880, thus:

"The decision of the courts of the United States as to the validity of corporate acts performed outside of the State creating the corporation, are hardly reconcilable with each other; nor is the reasoning of some of the opinions convincing. There appears to be a struggle between the logical results of the rule that a corporation *exists* only in the territory creating it, and the desire of the courts to prevent the repudiation by corporations of acts of which they have received the benefit. The cases are uniform in holding that: 1. A corporation *exists* only within the territory of the jurisdiction creating it. 2. A corporation can only be *organized* within the bounds of the State creating it. 3. Corporate *acts*, strictly so-called, can not be performed outside that territory. 4. The acts of duly authorized *agents* can be performed any where not forbidden by positive enactment. But, 5, Courts differ as to what are corporate acts and what are acts purely of agents; some holding that the directors are only agents, and others holding their acts as directors to be corporate acts."

In Field on Corporations the law is stated in section 243 thus:

"Sec. 243. *Corporate meetings can not be held outside the State.*

"Some controversy has existed in reference to the right of corporations to hold corporate meetings outside the State where the corporation was created. We have already alluded to the fact that a corporation has a legal existence for most purposes only in the State where constituted; and strictly corporate acts can only be performed in such State, though by the comity of States it may sue and be sued on contracts or for torts in other States; and, also, through its agents, make contracts and do other acts within the scope of its powers, like natural persons in any State. But a distinction has been drawn in respect to the authority to hold meetings outside the State, between strictly corporate meetings, and meetings of the directors; and this distinction seems to be supported by at least a preponderance of authorities. The question of the right of a corporation to hold strictly corporate meetings outside the State where they are created, was recently presented to the Supreme Court of Maine. The facts were as follows: A meeting of the corporators was called to organize under its charter in the city of New York, at which meeting the charter was accepted and its officers elected; and the question presented was whether the acts of the corporators were lawful. The court says: 'If the directors of the corporation legally chosen might transact business as such by a vote of the board, at a meeting held in another State, and might authorize persons to execute a conveyance of real estate, yet it would be necessa y to show that such persons were legally chosen directors, before any conveyance made by their direction would be considered as legally made. *All votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void.* The directors of a corporation are not a corporate body when acting as a board of officers or agents, and they may exercise their powers as agents beyond the bounds where the

corporation exists. Whether the statute provisions of this State, and the intention of the legislative power, or the general rule of law respecting corporations be examined, the conclusion must be the same: That this corporation could hold no meeting for the election of its officers, or for the regulation of its affairs without the limits of this State, and all such meetings and proceedings were without right or authority, and wholly void. The corporation can generally do no acts either within or without the State, except such as are expressly authorized by the organic laws of its being, or to be fairly inferred from the powers granted, and the acts must be done in the manner and by the officers or agents indicated in such law. And if the organic law does not grant the authority, either expressly or by imp ication, to hold corporate meetings without the limits of the sovereignty creating it, it follows that they could not thus lawfully meet, and any acts or contracts, attempted to be executed while thus met, would be *ultra vires* and absolutely void."

Field on Corporations, Sec. 243.

Wood's Field on Corporations, Sec. 216.

Wood's Railway Law, Sec. 139.

Miller v. *Ewer*, 27 Me. 517.

Ormsby v. *Vt. Copper Mining Co.*, 56 N. Y. 623.

Aspinwall v. *Ohio, etc., R. R. Co.*, 20 Ind. 472.

Reichwald v. *Com. Hotel Co.*, 106 Ill. 440.

Freeman v. *Water Power Co.*, 38 Me. 343.

Hydraulic Co. v. *King*, 45 Ga. 34.

Hills v. *Parish*, 13 N. J. Eq. 380.

The reason of the rule that corporations cannot perform corporate acts of this nature, beyond the limits of the jurisdiction of the State, under whose laws the corporation is created, or the franchise granted, are well stated in the leading case of *Miller* v. *Ewer*, 27 Me. 509. In the opinion at page 518, the court say:

"There are a variety of corporations. It will only be necessary on this occasion to speak of one class of them, corporations aggregate, composed of natural persons. It is often stated in the books, that such a corporation is created by its charter. This is not precisely correct. The charter only confers the power of life, or the right to come into existence, and provides the instruments by which it may become an artificial being, or acting entity. Such a corporation has been well defined to be an artificial being, invisible, intangible, and existing only in contemplation of law. The instruments provided to bring the artificial being into life and active operation are the persons named in the charter, and those who by virtue of its provisions may become associated with them. Those persons or corporators, as natural persons, have no such power. The charter confers upon them a new faculty for this purpose—a faculty which they can have only by virtue of the law which confers it. That law is *inoperative* beyond the bounds of the legislative power by which it is enacted. As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty which confers it; and they cannot possess or exercise it there. Can have no more power there to make the artificial being act, than other persons not named or associated as corporators. Any attempt to exercise such a faculty there, is merely an usurpation of authority by persons destitute of it, and acting without any legal capacity to act in that manner. It follows that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter are wholly void."

In the case of *Ormsby* v. *Vermont Mining Company*, 56 New York 623, the statement of the case shows that:

"Defendant was a corporation organized and created by a statute of Vermont. Its shares were issued as full paid. One Durand became the owner by purchase and transfer of 800 of these shares, and one Gilbert of 500. While they were the owners and the stock standing in their names upon the books, a meeting of the stockholders was held

in the city of New York, at which neither Durand nor Gilbert were present or represented. At that meeting an amendment of the by-laws was adopted, authorizing the directors to assess the stock to pay debts, and to furnish means to carry on the company, and empowering the treasurer to sell the shares of any stockholders refusing or neglecting to pay the assessment."

Under this authority an assessment of the stock was accordingly made, and the shares of Durand and Gilbert were sold for non-payment thereof.

Upon this state of facts, it was held by the Court of Appeals of New York:

"That according to the settled law of corporations, *neither stockholders nor directors can do a corporate act* out of the jurisdiction creating the corporation, which shall have any force to bind those who do not participate in it; and that, therefore, neither of the meetings in New York, *ex proprio vigore*, bound Durand and Gilbert, or imposed on them any further obligation, even conceding the corporation had power to impose further assessments on full paid stock."

Ormsby v. *Copper Mining Co.*, 56 New York, 623.

"All votes and proceedings of persons professing to act in the capacity of corporations, when assembled beyond the bounds of the State granting the charter of the corporation, *are wholly void.*"

Angell & Ames on Corp., Sec. 498.

The case of *Railway Company* v. *Allerton*, 18 Wall, 233, directly supports our second proposition, and is also authority upon the point *that changes in the power and duties* of the corporation, or in the amount of its capital stock, can not be made by the directors without the consent of the shareholders. In other words, *an act which works such changes in the organization of the corporation*

is a corporate act, in the most strict sense of the term, requiring the assent of the shareholder.

The court there say:

"Without attempting to decide the constitutional question, or to give a construction to the act of the legislature, we are satisfied that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter, cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. * *

"Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter, *but such a law should be regularly accepted by the* stockholders.

'Such assent might be inferred by subsequent acquiescence, but in some form or other it must be given to render the increase valid and binding on them.

"*Changes in the purpose and object of an association*, or in the extent of its constituency and membership, involving the amount of its capital stock, are necessarily fundamental in their character and can not, on general principles, be made without the express or implied consent of the members."

"The reason is obvious, first, as it respects the *purpose and object*. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates would be to commit them to an enterprise which they never embraced and would be manifestly unjust."

Railway Company v. *Allerton*, 18 Wall. 234.

There are undoubtedly many acts which the board of directors, as agents of the corporation, may perform outside of the State in which the corporation has its legal existence. But these are acts within the scope of their

existing power under the charter, such as making of contracts, mortgages and other acts of like character. They do not extend to anything which affects the powers, objects or purposes, or the organic existence of the corporation itself. The latter are corporate acts in the strict sense of the term, which, as the authorities all agree, can only be performed where the corporation has its legal existence.

Galveston Railroad v. *Cowdrey*, 11 Wall, 459, 476.

"A corporation can not perform acts outside of the State under which it is created, which are strictly corporate acts, but may perform other acts, not corporate acts in the strict sense of those words."

Reichwald et al. v. *Commercial Hotel*, 106 Ill. 450.

To the same point see *Eidman* v. *Bowman*, 58 Ill. 444.

In this case it appears that the East St. Louis Bank was chartered by act of the General Assembly of 1865, with a capital of $100,000, with power to increase it to $500,000. The $100,000 authorized capital stock was subscribed, the company was organized, and a board of directors elected, who, in 1869, attempted to increase the capital stock, to prevent which an injunction was asked.

In discussing the question the Supreme Court said:

"In this case we shall only consider the questions presented and discussed, which are, whether the directors had the power, under their charter, to order the increase of the stock and open books for its subscription, without the assent of the shareholders. It will be observed the charter, in terms, confers the power to make the increase, but is silent as to the mode in which it shall be done. It would seem to admit of no doubt that it is to be done by the directors alone, by a vote of the stockholders conferring the power on the directors or by their joint action. That the directors are but the agents or trustees of the share-

holders for the honest, faithful and prudent management of the legitimate affairs of the shareholders, there is no doubt. But the question is as to the extent of their powers. Are they unlimited? Are all of the powers conferred on the company delegated to them by their election and admission to their office, or are there powers which are still reserved to the shareholders, and which cannot be exercised by them, until the power is conferred by the shareholders? It would seem that the management and transaction of all business for which the company was created, and the general affairs of the corporation, devolve upon, and may clearly be exercised by them; and there are other powers that are as clearly reserved to the shareholders.

"The power to appoint or elect directors, does not devolve upon them, but that power is reserved to the shareholders. The power to sell and transfer the charter and franchises is not granted to them; the power to dissolve the body is not within the scope of their authority; and other powers which they are unable to exercise might be enumerated. Is the power possessed by them to effect great or radical changes in the organization of the body, without the consent of the shareholders? Can they, at pleasure, and without the consent of the shareholders, increase or diminish the capital stock of the company, and thus materially affect the value of the shares and the amount of dividends?

"When this incorporation was organized, the charter, and all of its franchises and privileges vested in the shareholders, and the directors became their trustees for its management. * * * * * * * * * * *

"It would be a dangerous power to intrust to directors to increase the stock of the company at pleasure, and to sell it to whom they might choose. Such a power would be liable to great abuse; it would enable directors to p r-petuate their official position almost indefinitely on a reserved capital stock of $400,000. It would enable them, at pleasure, to depress the price of the stock in market; it would deprive the original shareholders of their just and legal right to dividends, if the new stock were issued

to persons not already members of the corporation. Other injustice and wrong could be perpetrated if this should be held to be an incidental power to be exercised by a board of directors of a corporation. The power is such that we will not infer its existence in a charter, unless clearly expressed; and the charter, in this case, contains no such language."

All courts follow the construction given to the statutes of any State or country by the court of last resort of such State or country.

The construction given to the statute of Illinois will be followed by this court, unless the statute is found to be in contravention of the constitution of the United States, or a federal statute. Here is a general rule as to the exercise of corporate power under the laws of the State of Illinois clearly and explicity announced by the Supreme Court of said State. In passing upon a like question of corporate power arising under the laws of that State, this court will follow that rule. It will be observed too, that the attempted usurpation by the board of directors of the East St. Louis Bank, was far less in character than that of the directors of the railroad company in the case at bar.

In that case the charter clearly authorized the increase of capital stock, and the question was whether the power to make the increase was vested in the stockholders or the board of directors. It is true the increase might have changed the power of control of the corporation, placing it in the hands of others than those who before the increase held the majority or controlling amount of the stock; but it did not change the character of the corpora-

tion, nor authorize it to engage in any new or other business than that contemplated by the charter. It did not create a condition which in any contingency would increase the individual responsibility of any stockholder without his previous consent. In short, what the directors attempted to do, was something which the corporation was fully authorized to do when it proceeded in a proper manner.

In the case at bar the action of the directors, if binding, involved an essential change in the character of the corporation, the assumption of powers not granted in its charter, making it a real estate improvement and a harbor improvement company as well as a railroad company, and investing it with the additional franchise of the right to maintain wharves and docks and to collect wharfage and dockage fees and charges.

This not only increased the liability of the stockholder without his consent, but jeopardized the interests of every stockholder in the corporation.

Can it be doubted, for a moment, how the Supreme Court of the State of Illinois would regard this attempted acceptance of the Lake Front grant, if the action of the board of directors of the Illinois Central Railroad Company sitting in New York, can be dignified by the admission that it was such an attempt? That it would be held to be an usurpation can scarcely be questioned.

In the bank case the charter clearly implied that an increase of capital *would* be made and expressly conferred the power to make it; while in the case at bar, the charter

of the railroad company neither implies that the company will engage in other than railroad business, nor power to provide for so doing.

If the Lake Front Act conferred upon the Illinois Central Railroad Company any additional corporate powers, and authorized it to own the submerged lands in the Chicago harbor, and construct thereon docks, wharves and piers, and lease the same or collect wharfage dues for the use thereof, to that extent the purpose and object of the corporation was changed. No such change could be effected without the consent of the shareholders, express or implied. And, as we have shown, the giving of such consent is a corporate act, which can not be performed in another State, either by the board of directors or shareholders.

Assuming, therefore, for the purpose of the argument, that the Lake Front Act was constitutionally passed, with a sufficient title to express the subject thereof, yet the same did not become an obligatory contract until the Illinois Central Railroad Company in its corporate capacity had so accepted the grants of corporate power supposed to have been contained in the act, as to make the same obligatory upon the company, as well as the State of Illinois. As we have shown, no such acceptance by the corporation took place until after the supposed "special or exclusive privileges" offered thereby had been withdrawn by the constitution of 1870.

It is not within the power of the board of directors to accept the grant of the submerged lands, until corporate power existed in the corporation to own the harbor of the city of Chicago, which could not be used for railroad pur-

poses. This power did not exist at the time of the meeting of the board of directors in New York, on the 6th of July, 1870. And as we have already shown, the pretended acceptance of the grant of the lands at that place could not operate as an acceptance of any implied power in the corporation to take the grant, for the reason that no such acceptance of additional corporate power could be made by the board of directors, nor could it be made by the corporation beyond the territorial limits of the State creating the same. The necessary result is that the resolution adopted by the board of directors in New York, purporting to accept the grants contained in the Lake Front Act, was wholly void.

In the case of *Colman* v. *The Eastern Counties Railroad Co.*, reported in English Railway & Canal Cases, Vol. IV, p. 382, "the managing directors of a railway company, with a view of increasing the traffic on their line, entered into a contract with a steam packet company, that they would guarantee the proprietors of the steam packet company a minimum dividend of 5 per cent. on their paid up capital until the company should be dissolved, and that, upon a dissolution, the whole paid up capital should be returned to the shareholders in exchange for a transfer of the assets and properties of the steam packet company.

"One of the shareholders filed a bill * * * * * and obtained an injunction to restrain the completion of the contract. Held that directors have no right to enter into or pledge the funds of the company in support of any project not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders. * * * *That acquiescence by shareholders in a project for however long a period*, affords no presumption that such project is legal."

"An attempted alteration of a charter by statute would be wholly ineffective until unanimously accepted by the company."

I. Morawetz on Corpns., Secs. 295, 395.

"A board of directors has no implied authority to make a material and permanent alteration of the business or constitution of a corporation, even though the alteration be within the company's chartered powers. Such an alteration can be effected only by authority of the shareholders at a general meeting."

Id., Sections 512, 514.

VI.

Under the constitution of 1848 it was not competent for the General Assembly to grant to the Illinois Central Company the title to the land in question by a mere legislative act, without the approval of the Governor.

Sec. 25, Art. IV, of the constitution of 1848, is as follows:

"All grants and commissions shall be sealed with the great seal of the State, signed by the Governor or person administering the government, and countersigned by the Secretary of State."

That the grants referred to and embraced within this requirement of the constitution include grants of land the title to which was vested in the State, can not be fairly questioned. The land grant to the Illinois Central Railroad Company, in pursuance of the act of February 10, 1851, to incorporate that company, was required to be made by a deed executed by the Governor of the State under the great seal.

2 Purple's Statutes of Illinois, p. 1359, sec. 15; printed record, p. 617.

So also as to the canal lands, of which the commissioners were authorized to negotiate sales and issue certificates thereof, the Governor was required to issue patents therefor. The statute provided thus:

"And the person holding such certificate shall, upon presenting the same to the Governor, receive a patent for the land described in the same, signed by the Governor, and countersigned by the Secretary of State, with the seal of the State annexed thereto."

1 Purple's Statutes, pp. 422-3.

This section was inserted in the State constitution in order to provide an additional check and safeguard against improvident legislative acts depriving the State of its title to lands, and especially those held in trust to subserve some public use. It was intended to make the signature and approval of the Governor essential to the validity of all grants of the lands owned by the State, and as authentic evidence of the Governor's approval, that the same should be authenticated or countersigned by the Secretary of the State under the great seal of the State. The concurrence and approval of the Governor is, undoubtedly, the substantial thing required. We are not contending for mere form, but substance.

Under the foregoing provision of the constitution, a complete grant in order to show title, involves both legislative authority for the grant, and executive action in pursuance thereof. Without the signature of the Governor, duly authenticated, no title passes from the State.

In every instance where mere legislative grants of land have been held valid or sustained, under constitutional limitations, like those now under consideration, it will ap-

pear on examination that the act making the grant was signed and approved by the chief executive. But such was not the case in this instance. The Governor appears to have vetoed this iniquitous measure.

Printed record, p. 562.

The whole transaction is characterized as venal and corrupt in the public history of the State. It is fortunate that these provisions of the constitution stand as a shield to protect the people against this invasion of the public rights.

VII.

The right of the Illinois Central Railroad Company to construct wharves and piers in the lake in front of the open ground between Park Row and Randolph street, and the validity of the claim of the railroad company of the right to make permanent improvements in the lake in front of the ground which it owns, or claims to own, between Randolph street and the river, and between Park Row and lot 21, between 14th and 16th streets, is an important part of this controversy.

1. *As to the asserted right of the railroad company to use the harbor for railroad purposes.*

The lake in front of the city for a distance of one mile from shore, and co-extensive with the city limits from north to south, was as early as 1847 declared by the legislature of this State to be the harbor of Chicago, (printed record p. 540,) and it has been repeatedly recognized since then in legislation and otherwise as the harbor of the city. Since 1870 it has been by action of Congress

in the appropriation and expenditure of money for its protection, devoted to the uses of a harbor by the government of the United States.

As early as 1868, pursuant to a resolution passed by Congress at that time, the engineers of the United States were directed to investigate and report as to the propriety of appropriations and expenditures. for the purpose of constructing an outside harbor, or a harbor of refuge for the city of Chicago. That report was made probably some time in 1869, and the first appropriation was made in 1870. In 1869 then, when this Lake Front Act was passed, not only the State, but the United States, had by appropriate legislation designated this domain as the harbor of the city, and since then the United States has expended large sums of money in the construction of the outside pier for its protection.

This action on the part of the United States had the effect to place the regulation of the harbor under the control of the War Department at Washington, but that is not exclusive of the jurisdiction of the State. Both the United States and the State governments have power to control and regulate the harbor, and we understand the law as declared by the Supreme Court of the United States upon that subject to be that in such circumstances as exist here, it is competent for the Secretary of War to prevent obstructions to navigation in the harbor, and it is competent for the State to do precisely the same thing, the action of the State to be subordinate to the action of the United States. The action of the United States is of a negative or passive character; until Congress or the Sec-

retary of War has taken specific action, the United States does nothing except to prevent obstructions in certain places where they might be injurious to navigation, according to the plan devised by the proper officers of the government. In this case the action of the War Department has been distinct and well defined up to the present time. It has constructed an outside pier, and substantially declared that within that pier there shall be a harbor of refuge. It has also established a dock line, outside of which no constructions whatever shall be made, but within which the power to regulate constructions is left entirely with the State, provided they are in the general interest of commerce and navigation. In other words, the particular places within the dock line established by the United States authorities, at which piers and wharves shall be built, the direction which they may take, and all such matters of detail are left entirely to State control, and until more minute directions and regulations are prescribed by the authorities at Washington, the territory within the dock line is completely under the control of the State.

Escanaba Co. v. *Chicago*, 107 U. S. 679.
Wilson v *Blackbird Creek*, &c., 2 Pet. 245.
U. S. v. *Duluth*, 1 Dill. 466.
Transportation Co. v. *Parkersburg*, 107 U. S. 691.

The map secured from the office of the United States engineer, shows that the water of the harbor is from eight to twenty feet deep. It was navigable in 1851, as well as at the time of the passage of the act of 1869, and it is navigable now and boats, ships and steamboats are and have been moored at the breakwater, from time to time,

and up to the present time throughout almost its entire length. It is not necessary, in order that water should be regarded as navigable in the law, that it should be of sufficient depth to float the largest vessels which enter the harbor. It is sufficient if even boats of very light draft can be accommodated, and it was held, by the Supreme Court of Massachusetts, that a stream of water two and one-half feet deep, upon which pleasure boats were in the habit of passing and repassing, and which had never been used for purposes of commerce, was regarded as navigable water, and obstruction to the navigation was prevented.

Attorney General v. *Woods*, 108 Mass. 436.

If it were necessary to fortify the proposition that all the territory included within the harbor was and is navigable water, there is sufficient warrant for it found in the decision of the Supreme Court of this State, in the case of *The State* v. *The City of St. Louis*, 5 Gilm. 351. In that case that part of the channel of the Mississippi river in respect to which the controversy arose, was, in ordinary stages of the water, of such depth as to allow small water crafts, steamboats of light draft, flatboats and barges to pass and repass upon it, and at high water the ordinary river steamboats were in the habit of navigating it; but at low stages of the water the channel was not used for purposes of navigation, but simply for the purpose of mooring vessels. It was held by the court that this channel, and all of it, was navigable water, and subject to the rules and principles of law obtaining in such conditions.

It is not, we think, seriously urged by the counsel for the railroad company, that the *act of 1869*, confers any authority upon the company to enter upon the harbor for the purpose of making land for railroad purposes. That act prohibits obstruction to navigation. But the occupapation of the navigable water of a harbor by a single railroad company is obviously an injury to general commerce and navigation. Even if the railroad company is decided to be the owner of the submerged land the use of the land and water remains in the public until that use is changed by competent authority. There is no such intention evinced in the law. On the contrary, the manifest intention of the legislature was to protect and preserve the harbor for commerce by water; the references to navigation and rates of wharfage and dockage can have no other signification.

It is, however, claimed by the railroad company that its charter of 1851, confers upon it the right to take possession of all the submerged land and waters belonging to the State, on and adjacent to its right of way, whenever the necessities of the company require it, for the purpose of providing yard room and spur tracks, as well as for maintaining, operating and changing its railroad and railroad grounds. That act provides as follows:

"The railroad company shall have a right of way upon and may appropriate to its sole use and control for the purpose contemplated herein, land not exceeding 200 feet in width through its entire length, may enter upon and take possession of, and use all and singular, any lands, streams and materials of every kind for the location of depots and stopping places, for the purpose of constructing bridges, dams, embankments, excavations, station

grounds, etc., necessary for the construction, completing, altering, maintaining, preserving and complete operation of the road; all such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes."

(Section 3, charter of 1851, printed record, p. 612.)

Section 10 of the act permits the company to construct its road and branches over and across any stream of water, highway, &c., but the company "shall restore the stream of water, cross-road or highway it has intersected to its former state, or in a sufficient manner not to have impaired its usefulness."

It is to be remarked that the cession of the public lands and waters of the State for railroad purposes is confined to "land not exceeding 200 feet in width through its entire length;" and further, "all *such* lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes," referring evidently to the limitation of 200 feet in width, beyond which the grant or cession was not to be extended. The case shows that the railroad company has taken its right of way 200 feet in width, and made and filed a location thereof in the office of the Secretary of State. But it is claimed for the railroad company that the right to enter upon the public waters of the State is a continuing right, and that it may be exercised in respect to the submerged lands now constituting the harbor of Chicago, lying east of and adjacent to its right of way; and the claim extends to the point of contending that this may be done, not only with a view of providing facilities for itself, but also for as many railroad companies as it may choose to make its tenants and

lessees. The testimony of Mr. Jeffrey shows that it is the policy and plan of the company to procure other railroads to use and pay for the facilities which the Illinois Central Company may thereby provide for them, and that its practice has been to make application to other railroad companies to lease such facilities.

Mr. Jeffrey is asked the following questions:

"Q. Has the Illinois Central Railroad Company recently within two years endeavored to secure other roads to make permanent track facilities with it, and provide them with room and trackage?

"A. Yes sir; it has been the policy of the railroad company to obtain other tenants and use their facilities in common with it.

"Q. In general terms they are seeking the employment of their facilities, are they not, from other roads?

"A. No, I would scarcely say they were seeking it, but they were open to negotiations." (Record, page 257.)

We suppose it will be conceded by the defendant, and it is manifestly the law, that this authority, contained in the charter, to enter upon the waters of the State, was not so broad as to allow an appropriation of public lands or waters which had been devoted to public purposes. And it must be true that when the property of the State has been devoted to a public purpose, whether for streets, parks, or public grounds of any kind, the right to enter upon it for railroad purposes, given in general language, is gone.

It was expressly held by the Supreme Court of Illinois, in the *City of Jacksonville* v. *Railroad*, 67 Ill., 540, that the charter of a railroad company, containing a provision that it might enter upon and occupy for its railroad the streets, alleys and public grounds of the city of Jacksonvi le, would

not permit the construction of the railroad over a public park in that city, because it had been devoted to another and different purpose.

But a completely analogous case is that of *St. Louis, etc., Railroad* v. *Trustees*, 43 Ill., 303. In that case the railroad company, by the third section of an act amending its charter, was authorized to enter upon the waters, lands and streams of the State for the purpose of constructing, etc., in substantially, if not literally, identical language with that used in the charter of the Illinois Central Railroad Company. Under that legislative authority the railroad company proposed to enter, by condemnation or otherwise, upon a portion of the grounds owned by the State, and used for the maintenance of the institution for the education of the blind, in the city of Jacksonville. The court denied the right of the railroad company to make this entry, and in the opinion the question was discussed as follows:

"The language of this enactment is broad and comprehensive, and would literally embrace the right to appropriate any property owned by the State, but failing to grant any property specifically, can it be inferred that it was intended that property owned and already appropriated by the State to permanent and specific purposes could be taken? This property was not specifically granted by the State to the company, but had been permanently appropriated to the use of a state institution, and was being used for that purpose.

* * * * "The word 'necessary' has great flexibility of meaning. It is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose. If we were compelled to say that the General Assembly intended to embrace this property in the grant, we should hold that, as a condition to this appropriation to the use

of the company, it would have to appear that this property was indispensably necessary, not merely convenient or profitable to the road, but to its completion and operation; that without it the objects and purpose of the creation of the company would be defeated and the company cease to exist."

In Mills on Eminent Domain, section 46, the principle is well stated as follows:

"To take property already appropriated to another public use the act of the legislature must show the intent so to do by clear and express terms or by necessary implication, leaving no doubt or uncertainty respecting the intent. * * *

"Authority to flow land does not include authority to flow a public road. * * *

"Without special authority, a reservoir cannot be established so as to cover public streets. * * *

"The legislature is not presumed to have abandoned the former use and turned over the property to the latter use without clear and unmistakable expression of that intention. Lands held for purposes of public parks, reservoirs or institutions for the blind cannot be taken for railroad purposes, even though the railroad company was authorized to take for its route all lands necessary belonging to the State."

Citing many cases.

It will also be noticed that in the charter of the railroad company there is no reference to navigable water, and it is not to be presumed that navigable water, and particularly such navigable water as had been appropriated by the State to the purposes of the harbor of the principal city of the State, was intended in the general words of the authority.

The designation and appropriation of this harbor by state and national legislation was a legislative dedication of the water to purposes of navigation, and the claim of

the railroad company to divert it from that use, and to transform the harbor of the city into a track way and road yard is too preposterous to require serious consideration.

VIII.

The act of 1869 by its confirmatory clause conferred no new right.

The first and second sections of this act relate to the sale by the city of Chicago of a portion of the ground known as Lake Park, extending from Monroe street to Park Row, the proceeds of the sale to be devoted to park purposes proportionately, in the three divisions of the city. We do not think it is denied that the repeal of the act in 1873 took away from the city whatever right it might desire to exercise in this respect.

The fourth, fifth and sixth sections of the act relate to the three blocks lying between Monroe and Randolph streets, which were attempted to be appropriated by the three companies for the construction of a station house. The $200,000 required to be tendered to the city was refused, and immediately thereafter a bill was filed in this court to enjoin the railroad companies from taking possession of these blocks; an injunction was granted, and has been in force from that time to the present. The $200,000 which was left with the city comptroller was returned to the various railroad companies and accepted by them. One of the railroad companies, mentioned in the act as a grantee of the blocks, has removed its tracks from this vicinity, and we may assume that we need not concern ourselves with this grant to the railroad companies of the three

blocks. They have been abandoned by the railroad companies, and no effort whatever has been made to dissolve the injunction obtained in 1869.

The third section of the act purports to confirm the right of the defendant railroad company, "under the grant from the State in its charter, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control to the submerged land lying east of a line parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections 10 and 15." This relates exclusively, we think, to the submerged land in front of the Lake Park grounds, between Randolph street and Park Row. The language is not susceptible of any other construction. A line "parallel with and 400 feet east of the west line of Michigan avenue, in section 10 and 15," must refer to the straight line beginning at Park Row and ending at Randolph street, and to nothing more. Besides, it is only from Park Row northward that the line of the company's right of way is 400 feet east of the west line of Michigan avenue, and parallel thereto.

The confirmation is confined to the *right* of the railroad company, and if there was no right to enter upon the harbor of Chicago given by its charter, then there was nothing whatever upon which the confirmation could take effect. It is, however, claimed by the company that whatever was in the use and occupation of the railroad at that time, was confirmed. That is not the true construction of the language; but even if it were, it could afford no help to the defendant company. It appears from the testimony

that the use of the property between Randolph street and Park Row, in the year 1869, consisted of a double track pile bridge, and if there was anything to be confirmed by this clause of the act, it was simply the right to maintain that bridge, and it is impossible to conceive how riparian rights or any interest in the public harbor could be secured to the railroad company by such occupation.

But this section is only confirmatory of existing rights, and created no new ones. At that time the railroad had no right or estate in the line occupied by it in the lake in front of fractional sections 10 and 15, except a right of way, or easement. To such easement no riparian rights belong, nor did the company take any such rights by virtue of its "appropriation, occupancy, use and control," of such right of way.

There was no "riparian ownership *incident* to such grant, appropriation, occupancy, use and control," of the submerged lands over which the company was in the use and enjoyment of a mere easement, and this confirmatory clause did not create any such "incident."

By the third section of its charter, the company was given the right of way over lands belonging to the State, and the right to enter upon such lands for such purpose and no other. Even had it been filled and made dry land for the entire distance in front of fractional sections 10 and 15, the company would have owned nothing at the time of the passage of the Lake Front Act, except this right of way or easement 200 feet wide, and all riparian incidents would still have belonged to the owner of the shore land. Such riparian owner could not be divested of his property

rights and have them vested in the railroad company by either an original or confirmatory act of the legislature. Vested property rights are not held at the mere mercy or will of the legislature.

The grant of right of way is limited to 200 feet. This had been appropriated and was in use by the railroad company before the passage of the Lake Front Act. No mention is made in the charter of navigable streams, lakes or harbors, nor is the company authorized or empowered to interfere with such streams, lakes or harbors, either for the purpose of obstruction or improvement; but it is required to restore all streams to their former state, "in a sufficient manner not to have impaired their usefulness."

But the grant in the charter of the right to enter upon streams, is the same and for the same purpose as the right of entry upon lands; namely, for *railroad* purposes.

There is no grant of right to enter upon streams or lakes for purposes of water transportation or navigation, nor does the right of entry for railroad purposes, endow the company with any of the attributes of a marine transportation company. It was not authorized by such grant, even to own boats plying in the water on which it might enter, and charge fare for transportation thereon. Much less was any power granted to change the use of a harbor from marine to railroad purposes, as implied by the power now claimed under the Lake Front Act.

That this is the law, even if controverted, is conclusively established by the fact that in 1877 the General Assembly of the State of Illinois passed an act entitled "An act to

facilitate the carriage and transfer of passengers and property by railroad companies," the first clause of which is as follows:

"That all railroad companies incorporated under the laws of this State, having a terminus upon any navigable river bordering on this State, shall have power to own for their own use any water craft necessary in carrying across such river any cars, property or passengers transported over their lines, or transported over any lines terminating on the opposite side of such river to be transported over their lines."

Rev. Stat. Chap. 113, Sec. 39.

It is well understood that this act was passed largely for the benefit of the defendant railroad company, to enable it to own water craft to transport passengers and property across the Ohio river at its southern terminus at Cairo. And so we contend, that neither by its charter, by the grant of the submerged lands in the act of 1869, nor by the confirmatory clause of said act, is the Illinois Central Railroad Company authorized to construct wharves and piers in the navigable waters of the harbor of the city of Chicago.

"A corporation formed for public transportation cannot sustain a right to demand toll irrespective of authority given by the charter, upon the ground that it is absolute owner of the works and of the land it occupies. The corporation has no rights of property except those derived from the provisions of the charter, nor can it exercise any powers over the property it holds, except those with which the charter has clothed it."

Perrine v. *Canal Co.*, 9 How. 172.

In a leading case discussing the corporate powers of the Illinois Central Railroad Company, the Supreme Court of Illinois say:

"The object of creating appellant a corporation was, to construct and operate a great railroad through the central part of the State. The powers expressly conferred upon it were, to 'survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan canal to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan, and also a branch, via the city of Galena, to a point on the Mississippi river opposite the town of Dubuque, in the State of Iowa.' Laws of 1851, p. 61, Sec. 2. No authority is given to construct other lines of railway, or to engage in carrying by water, or otherwise than by the lines of railway so to be constructed. Every section of the act relates to the accomplishment of this purpose and none other. It was to aid in it that the munificent donation of lands was made by the State, and the exemption granted by the 22d section.

"As was observed in *Neustadt* v. *The Illinois Central Railroad Co. supra.* [31 Ill. 484.] 'In consideration of the undertaking of the company to construct a great thoroughfare, which should involve the expenditure of millions, and which was an experiment, and seven per cent. of the gross amount of its receipts or income to be paid to the State, the company was relieved from the payment of all other than State taxes, to be assessed as provided for in this section.'

"The taxes, then, from the payment of which the legislature intended to relieve appellant, could have been only the taxes which it, as a railroad corporation, would be otherwise liable to pay upon its property acquired in the prosecution of its business in constructing and operating these lines of road. None other could have been contemplated, for the plain reason that it was not intended that any other business should be engaged in. And it is a familiar rule of construction, that a corporation has such powers only as are specifically granted by its act of incorporation, or as are necessary for the purpose of carrying into effect those powers. 2 Kent's Com. (8 ed.) 350; *Met. Bank v. Godfrey*, 23 Ill. 602.

"It surely needs no argument to prove that steamboats are not railroad property, or that the right of carrying by rail does not include, as a necessary incident, the right to carry by water. The duties and obligations of carriers by water are, in many respects, entirely different from those of carriers by land, and it is impossible that a system of rules and regulations strictly applicable to the duties of the one could be applied to the other.

"It may be that the business prosperity of appellant is greatly promoted, and the public convenience subserved, by its ownership and use of this boat. So, too, it might be by lines of stage coaches, or by constructing canals or other lines of railway, to connect with its lines of road at such convenient points as would enable it to draw to itself the trade and travel of the country for many miles east and west; yet, it could not be claimed that, therefore, such enterprises are within the powers conferred by the appellant's charter, or that property so employed is within the contemplation of the legislature in the enactment of the section under consideration.

"We take the true inquiry to be in regard to property acquired and used by appellant, and claimed to be exempt from taxation, as was held in a similar case in New Jersey, (*State* v. *Newark*, 2 Dutcher, 520,) 'Where does the necessity end and the mere convenience begin?' It was there said: 'The necessary appendages of a railroad and transportation company are one thing, and the appendages which may be convenient means of increasing the advantages and profits of a company are another thing.' And in *Railroad* v. *Berks County*, 6 Barr, 70, under a somewhat similar exemption clause, it was held that, as the railroad was exempt from taxation, that property only which was necessary and indispensable to the construction and use of the road was within the exemption. See, also, to like effect, *The State* v. *The Com'rs of Mansfield*, 3 Zabriskie, 510; *Inhabitants of Worcester* v. *The W. R. R. Co.* 4 Metcalf, 564; *Vermont Central Railroad Co.* v. *Burlington*, 28 Vt. 193,"

Ill. Cent. R. R. Co. v. *Irwin*, 72 Ill. 452.

The points made by the court in that case so aptly apply to the claims of the railroad company involved in this case that their discussion is unnecessary.

IX.

The right to construct wharves and piers in the navigable waters of a public harbor does not pass with a grant of the submerged land. The authority and duty of the city to develop the harbor by the extension of streets and piers has not theretore been taken away, nor has it been deprived of its riparian rights as owner of the public ground in front of the harbor.

The State has devolved upon the city of Chicago the right and duty of regulating constructions and making wharves in the harbor. The original charter passed in 1837 conferred upon it the power to extend its streets as piers or wharves into the harbor, and the same authority has existed up to the present time. Since the adop'ion of the present charter of 1872 the power has been enlarged by giving the city general and unqualified right to make wharves and piers and control their use. Either the city, or the State represented by the canal commissioners, is riparian proprietor as the owner of Lake Park extending from Monroe street to Park Row. The act of 1869 has taken away neither the right to extend its streets as piers nor the rights of riparian proprietors. Between Monroe street and the river the riparian rights belong to the owner of the shore unaffected by the Lake Front Act, with the right still in the city to extend its streets as piers.

It is to be observed that the grant is by its terms confined to the submerged lands constituting the bed of Lake Michigan within the limits of the harbor. There is no

grant of any right to wharf or to do anything whatever upon the land or within the navigable water. We respectfully submit that the right to construct wharves and piers upon this public highway does not pass under a grant of submerged land, and that the title and estate, if anything, which was taken by the railroad company, was a naked fee, with no right to develop the harbor or make constructions of any kind, except by implication, and referring to another part of this brief, we submit that this implication will not be added to an implied amendment of the company's charter, in order to enable the latter to exercise the power of owning, developing and controlling the harbor.

It can not be denied that the right of navigation exists in the harbor to its fullest extent. The right to anchor is an incident of navigation, and the right to anchor does not depend upon the ownership of the soil. It is necessarily independent of it. The right of the State, in the exercise of its power to control and regulate the use of the harbor, to float a wharf and anchor it to the submerged land which may belong to another, is not to be denied. The water does not pass in the grant of submerged land. The water, so far as it is susceptible of ownership at all belongs to the State. The maxim *usque ad coelum* cannot apply to the ownership of land under navigable water. The water constitutes a public highway free to the people of the State, and under the ordinance of 1787, free to the people of all the states of the Union. The water certainly is not susceptible of a private grant. If the State has the right to anchor and float wharves without regard to the

ownership of the soil, it must also have a right to construct wharves and piers, and pass them through the water from the soil to the surface, and as much beyond the surface as the necessities of navigation may suggest. The foundation of the wharf may as well be of stone as clasps of iron. When, therefore, the State granted, if it did grant, these submerged lands, to the railroad company the right to develop the harbor by the construction of wharves and piers did not pass as an incident or as appurtenant to the soil conveyed. We desire to make complete and absolute separation between the right to wharf and construct piers and the ownership of the soil; and we submit that it is an incontrovertible proposition that the grant of the submerged land of a harbor under navigable water does not carry with it the right to penetrate the water with wharves or other structures, and this position is not in conflict with the authorities.

We are now discussing the question of the right of the railroad company to develop and control the harbor, independent of that of the riparian rights of the owners of the shore, whether those of the city or the canal commissioners, and having regard to the future development of the whole harbor, comprising, as it does, an area of navigable water one mile in width and three-quarters in length. The form which this development may assume in the future, it is, of course, impossible to foresee. The whole extent may be filled with a system of wharves and piers, or only a small portion of it may be so occupied. The present dock line established by the United States engineers is sufficiently removed from the shore to enable the con-

struction of several wharves between the dock line and the shore. This line may be easily removed further east and the entire harbor filled with such constructions. One natural, and, as we think, a legal way of improving this harbor is for the city of Chicago to extend its streets as far into the lake as may be deemed proper, with slips and branch wharves on each side of that main pier.

In Hale's De Portibus Maris, part 2, chap 3, it is said:

"And thirdly. To every public port there were certain common tolls incident, as for wharfage and land-leave, and the like, which by law can not be taken without a lawful title by charter or prescription. * * *

"Upon all these considerations it is evident that the King hath a special concern and interest in the franchise of a common port."

In the same treatise it is laid down that there is in every port a *jus privatum, a jus publicum, and a jus regium.* The property of the soil, and the franchise itself may be in a subject, or the franchise may be in a subject, and the property in the soil may be in the crown. They may be united or they may be separated. The private right or the right of property relates more particularly to the ownership of the shore, although there may be, according to this ancient common law author, a private ownership of the soil under navigable water; and he says that in case of recession of the sea, the dry land thereby made would belong to the owner of the submerged soil. He also speaks of a grant of submerged land being separate from an interest in the water, and treats the two as distinct in many places. The right to take wharfage, and to erect wharves in navigable water, he treats as a franchise,

only to be secured by grant or prescription from the crown or from parliament. He speaks of the right of fishing and wrecking, as accompauying the ownership of the soil, but in respect to these last two points the subsequent English authorities have overruled him, and it is now well settled that the ownership of the submerged land does not give the exclusive right of fishing or of taking wrecks.

"The privileges of wrecks and royal fish have been separated from the other incidents which would attach to ownership of the shore, and vested in the crown as distinct incorporeal rights. The fact is of no importance while both the property of the shore and the ownership of these rights remain in the hands of the crown; but when a subject has established a claim by grant to either of them, it often requires to be remembered that there is no mere implication or presumption to carry the other with it."

Phear on Water, page 52.

Dickens v. *Shaw*, Hall on Seashore, App. p. xlv.

There has been in the city of New York no little litigation in respect to the right to construct wharves upon the river bank. The harbor of New York consists of the two rivers, and the ownership of the soil has for a long time been vested in the city of New York; and the legislature has conferred upon the city the right to convey the submerged land to the owner of the adjoining shore. It has never been held, to our knowledge, that a conveyance of the submerged land by the city of New York to any other than the riparian proprietor conferred a right to erect wharves in navigable water, but the right of the State, acting either by way of legislation or through the city of New York, to restrain the construction of wharves to the

limits prescribed by law or by the orders of the city authorities, has been repeatedly recognized.

In the case of the *People* v. *The Ferry Company*, 68 N. Y. 71, it is said that a grant of land under tide-water gives to the grantee a title to the soil, but does not authorize an interference with the public right in the waters. The grantee, by virtue of his proprietary interest, can exclude any other individual from the permanent occupation of the land granted, but the State does not by the grant divest itself of the right to regulate the use of the granted premises in the interest of the public, and for the protection of commerce and navigation.

The right of the State to restrict and limit and regulate the use of navigable water, where the title to the soil may be in a private citizen, is questioned by no one so far as we know; and if the right to regulate the use of the water, to remove constructions, to dredge out channels, rests in the State independent of the ownership of the soil under the water, does it not necessarily follow that the right to *make constructions* also rests in the State, independent of the ownership of the soil?

Even in the state of New York, where it appears to be the rule that the submerged land under navigable water may be conveyed to the owner of the adjoining shore, it is held by the court that a very different method of construction is to be applied to a grant of submerged land from that which obtains in a grant of land which may be used for agricultural or other purposes.

In *Langdon* v. *The Mayor, etc.*, 93 N. Y. 144, it is said:

"A grant of land by the sovereign, bounded by tide water, limits the land conveyed to high-water mark, and gives the grantee no private or exclusive rights whatever below that. In such case the grant is exclusively a conveyance of dry land, and is to be considered without reference to the water, just as if it were bounded on all sides by dry land; but when the sovereign grants land under water, which cannot in its natural state be subjected to any of the uses to which dry land may be devoted, then a different rule of construction must be applied to the grant, so as to make it effectual for some purpose. Such a grant may be made to give an exclusive right of fishery or navigation, or to enable the grantee to fill up the land for wharves and docks, or other buildings. The purpose may be plainly expressed in the grant. If it be not, then the intent of the parties must be ascertained from the nature and situation of the land granted; and all the circumstances surrounding the grant which may properly be considered for the purpose of ascertaining such intent."

This language is applied to a grant by the city of New York, the owner of the submerged land, to the owner of the adjoining shore, upon full and valuable consideration, and it might very well be held in such a case as that, which was a grant of very limited extent, that the ownership of the soil carried with it the right to extend a wharf beyond the point of navigability and within the limit of the soil granted.

The grant of a small portion of the submerged land adjoining the shore of Hudson river, to a riparian proprietor, is a very different thing from a grant of the entire harbor of a large city, one mile and three-quarters in length and one mile broad. Whether even the courts of New York would be inclined to recognize the right of the State or a municipality, if it owned the fee, to grant the entire right

of the State or the municipality to the whole harbor of New York, to a single individual, may well be doubted; and if such a grant were made or attempted to be made, the courts of New York would be inclined, we think, to place upon it a very much more limited construction than upon a grant of a small fraction of the submerged land in front of Mr. Astor's land.

But it is sufficient for our purpose to establish that even the courts of New York do not hold that a grant of the submerged land necessarily carries with it the right to construct wharves and charge wharfage. Wharfing is an incident of navigation, and more properly appurtenant to the water than the soil under the water. Such lands simply sustain the water upon which ships may ride or anchor or be moored. There are, as stated by Lord Hale, certain rights which may very properly be said to pass with a grant of submerged lands. If a mine were discovered under submerged land in a harbor, it would probably be competent for the owner of the soil to take ores from the mine, and he could prevent other people from doing so. If by some convulsion the water should recede and these lands should become dry, it is possible that the owner of the soil might use them for cultivation or otherwise, but so long as they are simply the support of the water over which all the citizens of the United States have a right to pass and repass in their ships and boats, the land itself is not susceptible of use except to support that water.

It was decided by Judge McLean, in reference to a ferry from the State of Illinois to Kentucky, that the ownership of the soil did not give an exclusive right to the ferry,

that it was a separate and distinct franchise which might pass from the State, independent of the ownership of the soil; and he also instances the matters of advowson and free warren which are separable from the ownership of the land.

Bowman v. *Wathen*, 2 McLean, 376.

The franchise of a market, again, has no connection with the ownership of the soil.

Lockwood v. *Wood*, 6 Q. B. 31.

In *The State* v. *St. Louis*, 3 Gilm. 351, the owner of the soil under a navigable channel of the Mississippi attempted to confer upon the city of St. Louis the right to make constructions upon that land, the effect of which would be to render the channel unnavigable, and to increase the flow of water in front of the city of St. Louis. The case was tried and decided upon the theory that the owner of this soil was attempting to make constructions on his own land but under navigable water; and the Supreme Court of Illinois held that the ownership of the soil conferred no such right; that all navigable waters within the limits of the State were subject to the public right of navigation, and under the control of the state authorities. In that case it was said by the court that the executive officers of the State possessed the right, by filing an information, to call upon the courts to prevent any interference with navigable channels within the limits of the State. So in this case the executive authorities of the United States and of the State and of the city, are asking this court to prevent constructions by a private corporation in the harbor of the city of Chicago.

The use of the submerged land in a harbor is connected with commerce and navigation, and all constructions for the benefit of navigation, and for promoting commerce, may be made upon the submerged lands in a harbor by the State without regard to the ownership of the fee. The use of the land is in the State. The fee of the land may be in the Illinois Central Railroad Company or elsewhere; and wharves, being absolutely essential to navigation and commerce within the limits of a harbor, must constitute a use of the lands and water completely separate from the ownership of the soil, and wholly within the control of the State, subject to the paramount control of the United States over the navigable waters of the harbor.

It cannot be denied that the State may place buoys at all convenient places throughout the harbor, and anchor them to the soil. Nor can it be denied that the United States may erect lighthouses with firm and solid foundations of stone at any point within the harbor in navigable water which it may select, and this may be done without regard to the ownership of the soil. Neither can it be pretended that there is any lack of power in the United States to dredge out any portion of the harbor, or to make any construction whatever within the harbor convenient for navigation and consistent with its power to regulate commerce. If the State did not choose to act, the right of the United States to erect wharves within navigable water could not be questioned; and the State of Illinois certainly has the same right, unless specifically prohibited by the United States, to make such constructions as may

be deemed to be for the interest of commerce and navigation, wherever the ownership of the soil may be.

In *Wiswall* v. *Hall*, 3 Paige, 313, it was decided that the right to wharf and to take wharfage tolls was of itself a franchise; and no constructions can be made and no wharfage tolls can be demanded within the limits of a harbor and a port over navigable water without the authority of the State or of the United States. Wharves are *prima facie* free, and the master of a vessel sailing into port, whether from stress of weather or otherwise, may moor his ship alongside of a wharf over navigable water, and the right of any person to demand wharfage is not to be presumed; such right is waived only from the State.

This was decided in the case of the Geneva, 22 American Law Register, page 584; and in the case of the *Transportation Company* v. *Parkersburg*, 107 U. S. 691. In that case the late eminent Justice Bradley makes a question which he does not decide, whether, in case there is only one wharf in a harbor, any wharfage whatever can be charged, and whether that single wharf is not necessarily free.

We conclude, therefore, that there is nothing in the mere grant of the submerged land which takes away from the State or the city the right to extend wharves and piers into the harbor in the interest of commerce and navigation.

X.

The right to wharf and construct piers in the harbor not passing with the grant of the submerged land, does it arise by implication from the words of the proviso, and is that implication of sufficient force to deprive the city of its power to extend streets as piers, and to take away the riparian rights of the shore owners?

The grant is of "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad Company for a distance of one mile, and between the Chicago river and lot 21," and it purports to make the grant in fee, "to the said Illinois Central Railroad Company, its successors and assigns."

The proviso is the following:

"*Provided*, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same; and that all gross receipts from use, profits, leases or otherwise of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which the said company shall forever pay into the State Treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter. *And provided, also*, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assembly which may hereafter be passed regulating the rates of wharfage and dockage to be charged in said harbor. *And provided, further*, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improve-

ments now, or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate, or of such occupancy, be exempt from municipal or other taxation."

If this was a grant from one individual to another, it would be a fair and legitimate inference that the right to use the land was given by the proviso, but in a grant from the State, where it is claimed that a franchise separate and distinct from the ownership of the soil is given to a corporation, there must be something more than implication or inference. Franchises do not exist by implication. It is not necessary to refer again to the law in respect to the strict construction of charters and franchises granted by States to corporations. It has been asserted too many times by the Supreme Court of the United States during a long period of years to make any reference to these authorities at all necessary. It is not necessary for us to deny that if the franchise of wharfing in this navigable water could pass by this act, and if it was plainly and distinctly given in the proviso, it would be just as effective as if it was contained in the granting part of the act; but in this act there are no words conferring a franchise either to construct wharves or to receive pay for their use. But the rule of construction of private grants by the sovereign is, *the claimants must show valid title by express grant, of all that is claimed.*

"The rule of construction of private grants, if the meaning of the words be doubtful, is, that they shall be taken most strongly against the grantor. An opposite rule pre-

vails in cases of grants made by a sovereign power. When there is doubt, the construction is made most favorably for the sovereign, and most strongly against the grantee. But this rule holds good only in cases of real doubt. But public grants should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed, even if by such construction the object of the grant is utterly defeated."

Mills et al. v. *County of St. Clair et al.*, 2 Gilm. 198.

But "the obvious meaning of the words employed" will not give life and force to an invalid act by dominating the requirement of the constitution that the subject of a private or local law shall be expressed in the title, nor will it be permitted to violate a well settled and wholesome rule, that amendments to private charters, granting new and unusual corporate powers will not be favored by implication.

If, as is frequently said by the court, it is true that when a corporation insists that it has certain powers, it must be able to place its hand upon the identical words conferring those powers, then the power and franchise of erecting wharves and charging for the use of them, is not given in this act, because it is impossible to point out the words which granted it. The provision that a portion of all receipts from the use of constructions shall be applied in a certain way, implies that constructions have been made or were to be made, but the power to make them was not given to this railroad company. It is said that the right to make constructions is implied from the grant of the land. We have attempted to demonstrate the opposite, but even if we were wrong, the further implication would not arise that the right to charge wharfage and

take tolls was implied from the right to make constructions, because this would be raising an implication upon an implication, which could not be tolerated. It is perhaps superfluous in this case to prove that the right to take wharfage tolls is not ceded to the railroad company, and that if the railroad company has the right and chooses to make constructions, they must be free to ships entering the harbor; but inasmuch as court is asked in the information of the attorney general to define the rights of the railroad company in respect to the lands and navigable waters comprising the harbor of Chicago, a reference to that question may not be improper.

In the case of the *Canal Proprietors* v. *Wheeley*, 2 B. & Ad., 792, a corporation was chartered for the purpose of constructing a canal. It was declared that the canal should be a public highway, which all citizens of Great Britain might navigate with their boats, and special provisions were made for the rates which should be charged for all boats passing through the locks of the canal. There was upon one portion of the canal a long level upon which there were no locks; and upon this level one of the citizens of Great Britain placed his boat and navigated the level back and forth without passing through any of the locks, and refused to pay toll. The court decided that, inasmuch as the provisions for the payment of toll were confined to boats passing through the locks, any one had a right to navigate the levels of the canal without payment of toll. This case has been frequently cited with approval by the Supreme Court of the United States.

In the case of *Perrine* v. *the Chesapeake and Delaware Canal*, 9 Howard, 172, a company had been organized for the same purpose, for constructing a canal, and which was also to be a public highway; and the provisions of the act of incorporation in respect to reserving tolls referred to various classes of freight, without mentioning passengers or passenger boats. The court decided that any one had a right to navigate the canal with passenger boats loaded with passengers, without the payment of toll.

The principle of these cases of course is, that all charters are to receive a strict construction, and no right against the public, or franchise passed by way of implication; and there being no specific provision for the payment of toll in the special cases, it could not be exacted. We submit, therefore, that even if the defendant railroad company has a right to construct and does construct wharves and landing places over the navigable water within the limits of the alleged grant, those wharves and landing places must necessarily be free to the citizens of the United States unless further legislation is secured from the State.

What is there in the act of 1869 that has the effect to repeal the provisions of the city charter, contained in the original act of incorporation in 1837, and continued through all amendments and revisions to the present time? Are all those provisions repealed by implication? There is no reference to them in the act of 1869. The title of the act does not express the subject of such change in the powers and duties of the city. There is the simple claim that the power to make constructions passed to the railroad company by an implied license or by an implica-

tion or inference from the proviso. It is not pretended that the power to wharf was expressly given, or that the provisions of the city charter were expressly repealed. If we put the position of the railroad company in the most favorable light, it would be stated thus:

"The land is granted in fee. It must be assumed that some use is to be made of it. The only use is to construct wharves and piers, and the use of the water for that purpose passes by an implied license. This right to use is further emphasized by the proviso which contemplates that such use of the land and water will be made. If that is not the purport and purpose of the act, what is it?"

If this were all correct and sound, as it is not, the reply would be that the act of 1869 was *a gross and irreparable mistake* on the part of the railroad company. The presumption of law is, that the company procured the act to be written, and applied to the legislature for its passage. It is presumed to have asked for all it wanted, and nothing is given except that which was specifically written down and solicited. The grant of the submerged lands was written in the act, and if it was competent for the legislature to make that grant, the railroad company obtained it. Nothing else was specifically asked for, and nothing else was obtained.

The railroad company has the consolation of knowing that it made the same mistake which others have made. In the *Perrine* and *Wheeley* cases cited above, it was a great oversight in the canal companies to omit from their charter the power to charge toll for the levels in one case, and for passengers and passenger boats in the other. But the omission occurred, and the Supreme Court has said

that the omission was fatal to their claim. The oversight is not less costly in this case.

Repeals by implication are not favored; *a fortiori* will an implication not be indulged or favored, which on the one hand vests a corporation with new powers and franchises foreign to the object for which it was created, and on the other hand, in order to vest these new powers, repeals legislation which had already vested them in another corporation.

This argument is not made here for the purpose of establishing the claim of the city of Chicago, but to show the untenable character of the claim of the railroad company.

XI.

The right to wharf in the harbor, even if given by the act of 1869, was revocable, and was recalled by the repealing act of 1873.

An analysis of the third section of the Lake Front Act will show that it is susceptible of a construction which makes it a license, and not an irrevocable grant or contract, protected by the Federal constitution forbidding the passage of laws impairing the obligation of contracts.

The words are:

"And all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan" within the limits defined, "are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: *Provided, however*, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same."

The words "successors and assigns" are superfluous and can have no signification attached to them, because, by the

proviso immediately following, there could be no successors and no assigns, and the limitation upon the grant is that the fee to the said lands shall be held by the said company in perpetuity, without power to dispose of the same. The words "in perpetuity" refer to the prohibition of alienation, and not to the length of time during which the land shall be held by the company or its corporate successors as a railroad company, or the character of the estate which the company takes. They mean simply that it is to be a perpetual prohibition upon any alienation of the lands. The words, to be sure, indicate that the land was granted in fee, but the proviso destroys the signification which is ordinarily attached to the word "fee," and grants the lands to the company to hold as of a qualified and limited estate.

It may be said that if the words of the proviso are inconsistent with the words of the grant, the proviso must be void, and the grant must stand as it is written. This would apply to a grant by the State of Illinois the old feudal and nearly obsolete rules which are applied to a grant from one individual to another, and would deprive the State, which has the power to prescribe rules for the construction of grants, of the right to determine the character of the estate which itself may convey.

It may be conceded that the ordinary rules of construction might with propriety be applied to a grant of the State when the subject of the grant was land held for sale, and which was susceptible of use and occupation by its citizens. There is reason in such case why the words should receive the same construction as is given in a grant from

one individual to another; but where the subject of the grant concerns the *jura regalia* of the State, it is impossible to say that it may not attach such limitations and qualifications to this grant as it sees fit. In fact, when in a grant of such a character the limitations and qualifications have the effect to keep this subject to general legislation, the harbor of the principal city of the State, within the power and control of the State, where it belongs, the limitations are entitled to greater weight than the words of the grant themselves. The harbor of this city is a subject of general legislation by the State. It *must* legislate in respect to it. The power to control cannot be abdicated and given away; and if words are found in the grant indicating in any way the intention of the State to keep the subject within its power of legislation and to limit, by proviso or otherwise, general words of grant, they should be considered as exercising a more potent influence upon the construction of the grant than the words of the grant themselves. Giving then, as we must, to the words of the proviso their full and complete scope and meaning, the construction must necessarily be that the lands are to be held by the company, with a perpetual prohibition upon alienation.

XII.

Did the State of Illinois possess the power to grant these submerged lands underlying the harbor of a great city, to a railroad corporation?

This is a very serious question, and while there is much apparent authority favoring the power, yet, as the case at bar is without precedent in many of its aspects, the matter as we maintain is by no means free from doubt.

It needs no argument or citation of authority to establish the proposition that it is not competent for the State to abdicate or relinquish any of its legislative power. If an attempt has been made to cede the land underlying the waters of a public harbor, thereby making them the subject of a private grant, and to vest the grantee with the exclusive right or a monopoly of making constructions to promote and facilitate the navigation within that harbor, or to refrain from making them at its will, the State reserving to itself no power whatever except that of preventing obstructions to commerce and regulating charges, it would seem that so far an attempt has been made at legislative abdication. The construction therefore, would be, that grant is confined to a naked fee of the soil; but assuming for the present that the grant of the submerged land carries with it, as it is claimed to do by the defendant railroad company, the exclusive power of making constructions in the harbor, and that it is irrevocable, then we insist that there is an abdication of the power of legislation which it is not competent for the State to make. There are no guarantees or sanctions prescribed in the act in respect to the time within which constructions shall be made, the directions which they shall take, the material of which they are to be constructed, nor in fact any mandatory provisions requiring constructions to be made at all; and if the construction of the railroad company prevails, the State has lost the power to make any regulations in this respect except in cases where the constructions which may be made shall be held by the courts and juries to amount to a nuisance. It is not the function of a state

legislature to devolve irrevocably upon a private individual or corporation such power over a public harbor. This brings us to a review of a number of authorities, including several decisions cited and urged in favor of the grant, in the court below, by counsel for the railroad company.

Soon after the case at bar was heard in the United States Circuit Court at Chicago, the case of *John P. Stockton, Attorney General of New Jersey*, v. *The Baltimore & New York Railroad Co. et al*, was heard in the Circuit Court of the United States for the District of New Jersey. In that case, the nature of the ownership by the State of the submerged lands underlying the navigable waters of the United States was involved, and in passing upon this question the late Justice Bradley said:

"It is insisted that the property of the State in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked, can the United States take the State House at Trenton and the surrounding grounds belonging to the State, and appropriate them to the purposes of a railroad depot, or to any other use of the general government without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title of ownership by which the State holds the State House, is quite different from that by which it holds the land under the navigable waters in and around its territory.

"The information rightly states that, prior to the revolution the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were

held by the State, as they were by the king, *in trust* for the public uses of navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris:* in other words, they were held for the use of the people at large. It is true that, to utilize the fisheries, especially those of shell fish, it was necessary to parcel them out to particular operators and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title; the land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of the public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions or useless parts affect the character of the title to the remainder.

"Such being the character of the State's ownership of the land under water, an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce, the question arises whether it is a kind of property susceptible of pecuniary compensation within the meaning of the constitution?

* * * * * * * * * * * *

"The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters, or the land under them, it has what is more, the regulation and control of them for the purpose of commerce. So wide and extensive is the operation of this power, that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove

such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient."

The learned jurist in the foregoing case remarks that the limitation on the right to take property for public use without compensation is, by the fifth amendment to the constitution, confined to *private* property. While this land underlying navigable water is public property, considered with respect to the character in which it is held, yet, in the sense that it is the property of another than the one who seeks to take it, it is private property. The public character which the court attributes to it thoroughly permeates it, not alone with regard to its ownership by the public, but much more in that it is held in trust *for the public* and for certain specific public uses to which nature adapts it, and to which it has been dedicated by the civil and the common law from the infancy of commerce.

As suggested by the court, in the foregoing case, "after the conquest the said lands were held by the State as they were by the king, *in trust* for the public uses of navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris; in other words, they were held for the use of the public at large.*"

It is said that "to utilize the fisheries, especially those of shell-fish, it was necessary to parcel them out to particular operators, *and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title:* the land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of the public fisheries."

While the lands were sometimes parcelled out and title given for that purpose in the interest of fishery, even this disposition was not made in the pretended interest of commerce, and the title when given in the former interest was held subject and subordinate to the paramount and broader interest of commerce.

We maintain that the law as laid down by the eminent jurist in the *Stockton* case, *supra*, is correct, and that it is inconsistent with the power of the State to grant exclusive ownership of the submerged lands held by the State in trust for the public. One of the earliest cases in which this question was involved, was *Martin* v. *Waddell*, 16 Pet., 336.

The case is full in its historic statement and replete with learning, and we refer to it with pleasure. The case was twice elaborately argued and maturely considered before it was decided.

The questions arose upon an action of ejectment to recover 100 acres of land lying beneath the navigable waters of Raritan river and bay, in the State of New Jersey.

The plaintiff showed title under charter granted by Charles II, to his brother the Duke of York in 1664 and

1674, for the purpose of enabling him to plant a colony on this continent, the boundaries embracing the territory now forming the State of New Jersey. The part of the territory known as East New Jersey was afterward by sundry conveyances transferred to twenty-four persons, called the proprietors of East New Jersey, who by the terms of the grants were invested within the territory conveyed to them, with all the rights of property and government which had been originally conferred on the Duke of York by the letters-patent of the king. Subsequently, in 1802, these proprietors surrendered to the crown all the powers of government, retaining their private property.

The defendant claimed the submerged land by virtue of a survey made in 1834, under the authority of the proprietors; while the plaintiff claimed an exclusive right to take oysters in the same place, deriving his title under a law of the State of New Jersey passed in the year 1824, and a supplement of the same year. If the proprietors were authorized to make the grant, then the defendant was entitled to the premises and had the exclusive right of fishery. The point in dispute was the construction and legal effect of the letters-patent to the Duke of York, and of the deed of surrender subsequently made by the proprietors to the crown. The letters-patent included a very large territory extending along the Alantic coast from the river St. Croix to Delaware bay, containing many navigable rivers, bays and arms of the sea, granting the tract of country and lands therein described, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings,

huntings and fowlings, and all other royalties, profits, commodities and hereditaments to the said several islands, lands and premises belonging and appertaining, with their, and every of their appurtenances, and all the estate, right, title, interest, benefit and advantage, claim and demand of the king, in the said lands and premises;" conferring upon him, his heirs, deputies, agents, commissioners and assigns the powers of government, with a proviso that the statutes, ordinances and proceedings established by his authority should "not be contrary to, but as nearly as might be, agreeable to the laws, statutes, and government of the realm of England," saving an appeal to the king in all cases of judgment and sentence in the colony.

The right of the king to make the grant with all of its prerogatives and powers of government is not questioned. Of the nature and extent of the interest conveyed by the letters-patent to the duke, of the character of the right claimed by the British crown in the country discovered by its subjects on this continent, and the principles on which it was parcelled out and granted, the court said:

"The country mentioned in the letters-patent was held by the king in his public and regal character as the representative of the nation and in trust for them. * * * *

"According to the theory of the British constitution, all vacant lands are vested in the crown as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative.

"It has been already shown that this principle was as fully rec gnized in America as in the island of Great Britain. This being the principle upon which the charter in question was provided, by what rules ought it to be construed?

"We do not propose to meddle with the point which was very much discussed at the bar, as to the power of the king since Magna Charta to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery either for shell fish or floating fish within the limits of his grant. The question is not free from doubt and the authorities referred to in the English books can not perhaps be altogether reconciled. But from the opinions expressed by the justices of the court of king's bench in the case of *Blundell* v. *Catterall*, 5 *Barn.* v. *Ald.*, 287, 294, 304, 309; and in the case of the *Duke of Somerset* v. *Fogwell*, 5 Barn. & Cress. 883, 884, the question must be regarded as settled in England against the right of the king since Magna Charta to make such a grant. The point does not, however, arise in this case unless it shall first be decided that in the grant to the Duke of York the king intended to sever the bottoms of the navigable waters from the prerogative powers of government conferred by the same charter; and to convert them into mere franchises in the hands of a subject to be held and used as his private property. * * * * For when the revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the constitution to the general government.

"A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation. * * * *

"The dominion and property in navigable waters and in the lands under them, being held by the king as a public trust the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund intrusted to his care for the common benefit. In such cases whatever does not pass by the grant remains in the crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly,

and it will not be presumed that he intended to part from any portion of the public domain unless clear and especial words are used to denote it.

"But in the case before us, the rivers, bays, and arms of the sea, and all prerogative rights within the limits of the charter, undoubtedly passed to the Duke of York, and were intended to pass, except those saved in the letters-patent.

"The words used evidently show this intention; and there is no room therefore for the application of the rule above mentioned.

"The questions upon this charter are very different ones. They are: Whether the dominion and propriety in the navigable waters, and in the soils under them passed as a part of the prerogative rights annexed to the political powers conferred on the duke. Whether in his hands they were intended to be a trust for the common use of the new community about to be established; or private property to be parcelled out and sold to individuals, for his own benefit. And in deciding a question like this we must not look merely to the strict technical meaning of the words of the letters-patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given it, and the usages under it, for the century and more which has since elapsed are all entitled to consideration and weight. It is such a deed conveying private property to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed. * * * *

"The point upon which different opinions have been expressed is, whether since Magna Charta, "either the king or any particular subject, can gain a propriety exclusive of the common liberty." But the existence of a doubt as to the right of the king to make such a grant after Magna Charta, would, of itself, show how fixed has been the policy of that government on this subject for the last 600 years, and how carefully it has preserved this common right for the benefit of the public. And there is

nothing in the charter before us indicating that a different and opposite line of policy was designed to be adopted in that colony. * * * *

"The estate and rights of the king passed to the duke in the same condition in which they had been held by the crown, and upon the same trusts. Whatever was held by the king as a prerogative right passed to the duke in the same character.

"And if the word 'soils' be an appropriate word to pass lands covered with navigable water, as contended for by defendant in error, it is associated in the letters patent, with "other royalties," and conveyed as such. No words are used for the purpose of separating them from the *jura regalia*, and converting them into private property, to be held and enjoyed by the duke, apart from, and independent of the political character with which he was clothed by the same instrument. Upon a different construction it would have been impossible for him to have complied with the conditions of the grant, for it was expressly enjoined upon him, as a duty in the government he was about to establish, to make it as near as might be agreeable in their new circumstances, to the laws and statutes of England; and how could this be done if, in the charter itself, this high prerogative trust was severed from the regal authority? If the shores, and rivers, and bays, and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell fish as floating fish, had been converted by the charter itself into private property to be parcelled out and sold by the duke for his own individual emolument?

"There is nothing, we think, in the terms of the letters-patent, or in the purposes for which it was granted, that would justify this construction. And in the judgment of the court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purpose that the navigable waters of England, and the soils under them, are held by the crown.

"This opinion is confirmed by referring to similar grants for other tracts of country upon this continent, made about the same period of time. Various other charters for large territories on the Atlantic coast were granted by different monarchs of the Stuart dynasty to different persons for the purposes of settlement and colonization, in which the powers of government were united with the grant of territory. Some of these charters very nearly resembled, in every respect, the one now in controversy, and none of them, it is believed, differed materially from it in the terms in which the bays, rivers, and arms of the sea, and the soils under them, were conveyed to the grantees. Yet in no one of these colonies has the soil under its navigable waters, and the rights of fishery, for shell fish or floating fish, been severed by the letters-patent from the powers of the government. In all of them, from the time of settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common the benefits and advantages of the navigable waters, for the same purposes, and to the same extent, that they have been used and enjoyed for centuries in England. Indeed, it could not well have been otherwise, for the men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers if the land under the water at their very doors was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another.

"The usage in New Jersey has, in this respect, from its original settlement, conformed to the practice of the other chartered colonies. * * * * And when the people of New Jersey took possession of the reins of government, and took into their own hands the power of sovereignty, the prerogatives and regalities which belonged before to either the crown or the parliament, became immediately and rightfully vested in the State."

While, as between the contestants in that case, the court found in favor of the one claiming title under the grant from the State of New Jersey, yet even this case does not announce, or, as the basis of its opinion, declare, the right of the State to make a grant in fee of the lands under navigable waters, such as the one in controversy in this case.

In *Den, ex Dem. Russell* v. *The Association of the Jersey Co.*, 15 How. 426, the doctrine announced in *Martin* v. *Waddell* was affirmed, and applied to land which had been recovered from water under an act of the legislature.

In the case of *Arnold* v. *Mundy* 1 Halst. N. J. 1, which this court reviews in *Martin* v. *Waddell, supra*, the Supreme Court of New Jersey states at length the law relating to soils under navigable waters as held by that court. Judge Kirkpatrick says:

"I am of the opinion that by the law of nature, which is the only true foundation of all the social rights, that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe, that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; by all these the navigable rivers, in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, *including both the water and the land under the water*, * * * * are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the *laws* which regulate that use; that the property indeed, strictly speaking, is vested in the sovereign, but is vested in him, *not for his own use*, but for the use of the citizen—that is, for his *direct and immediate enjoyment*.

"I am of the opinion that this great principle of the common law was, in ancient times in England, gradually encroached upon and broken down; that the powerful barons, in some instances, appropriated to themselves these common rights; that the kings themselves, also, in some instances, during the same period, granted them out to their courtiers and favorites; * * * * that the great charter * * * * restored again the principle of the common law in this as well as many other respects. * * *

"I am of the opinion that when Charles II took possession of this country, by his right of discovery, he took possession of it in his sovereign capacity. * * * * That he *could not*, and never did, *so grant what is called the common property as to convert it into private property;* * * * that upon the revolution all these royal rights became vested in the people of New Jersey as the sovereign of the country; * * * that this power of disposition and regulation must be exercised by them in their sovereign capacity; * * * * that the legislature in the exercise of this power, may lawfully erect ports, harbors, basins, docks and wharves, on the coasts of the sea and on the arms thereof, and in the navigable rivers; * * * that they may do those things themselves at public expense, or they *may authorize others to do it*, by their own labor and at their own expense; * * * but still this power is nothing more than the *jus regium*, the right of *regulating, improving and securing for the common benefit of every individual citizen.*

"*The sovereign power itself*, therefore, cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make *a direct and absolute grant* of the waters of the State, divesting all the citizens of their common right. *It would be a grievance which never could long be borne by a free people.*"

We have quoted from these cases at length, because the historic facts connected with them were the same as those in the *Stockton* case, *supra*, with which, as well as with

the law involved, no one in his time was more familiar than the eminent jurist who delivered the opinion in the latter case.

Virginia being a British colony, held the lands under the navigable waters by the same derivative title as New Jersey, and Illinois holds in the same manner.

In *Gibbons* v. *Ogden*, 9 Wheat. 1, this court held that the state of New York had no power to grant the exclusive right of navigation by steam of the rivers of that State. If the State cannot grant the exclusive use of the waters for navigation, can it any more grant the exclusive use of the soils which underlie and support the waters? If the state of Illinois can grant exclusive ownership of the tract described in the Lake Front Act, it can by the same power grant the exclusive ownership of all the submerged lands within the boundaries of the State extending from Chicago to the center of the lake, and all this vast area, committed to the State in trust for all the people, will pass from the trustee into private ownership.

The case of *Pollard's Lessee* v. *Hagan*, 3 How. 212, was dwelt upon at length in the trial court by counsel for the railroad company, as strongly sustaining the right of the State to dispose of the submerged lands.

It would seem almost presumptuous to attempt to explain that oft cited and well known decision to this court.

The case was a leading one on the question involved, viz: "The line that separates the sovereignty and jurisdiction of the government of the Union, and the State government, over the subject in controversy." But the question there involved was, could the United States give the plain-

tiff good title to a piece of land below high water mark on navigable waters? The contention of plaintiff was that the United States, as the sovereign, succeeded to the ownership of the lands under the navigable waters and below high water mark which was theretofore vested in the crown. It was decided that the title to these lands was in the state of Alabama and not in the United States, and therefore the United States could not give title.

The right of the State to give title to a private party, as involved in the case at bar, was not decided.

In *People* v. *New York & Staten Island Ferry Co.*, 68 N. Y. 71, it is said, "The title to the lands under tide waters within the realm of England, were by the common law deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could *neither destroy nor abridge*.

"In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise De Jure Maris (p. 22) Lord Hale says: 'The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use;' and Mr. Justice Best, in *Blundell* v. *Catterall* (5 B. A.. 268), in speaking of the subject, says: 'The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil.' In *Williams* v. *Wilcox* (8 A. & E., 314), the plaintiff claimed a right to maintain a weir in the river Severne, which had become an obstruction to

navigation, under a royal grant made before the reign of Edward I, and the court held that no valid grant for that purpose could be made by the crown, either before or after Magna Charta, but the action, which was trespass for throwing down the weir, was sustained on the ground that the weir had been legalized by 4th statute 25, (Ed. 3, C. 4); see, also, *Attorney-General* v. *Parmeter*, 10 Price Exch., 378.

"The principle of the common law to which we have adverted, is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right. But while the sovereign can make no grant in derogation of the common right of passage over navigable waters, parliament may do so. This is clearly shown by the case of *Williams* v. *Wilcox*, *supra*, and is well settled by authority. (*Rex* v. *Montague*, 4 B. & C. 598; Angell on Tide Waters, 85.) But a person claiming a special right in a navigable river or arm of the sea under a grant by parliament, as, for example, a right to obstruct it, or to interfere in any way with the public easement, must show a clear title. It will not be presumed that the legislature intended to destroy or abridge the public right for private benefit, and words of doubtful or equivocal import will not work this consequence. Public grants to individuals, under which rights are claimed in impairment of public interests, are construed strictly against the grantee, for it is reasonable to suppose that if they were intended to have this operation, the intention would have been expressed in plain and explicit language. (*People* v. *Laimbier*, 5 Den. 15; *Rowndes* v. *Dickerson*, 34 Barb. 586; Broom's Maxims, 583, and cases cited.)

The title to lands under tide-waters in this country which before the revolution was vested in the king, became, upon the separation of the colonies, vested in the states within which they were situated. The people of the state in their right of sovereignity succeeded the royal title, and through the legislature 'may exercise the same powers, which, previous to the revolution, could have been exercised by the king alone, or by him in conjunction with parliament; subject only to those restrictions which have been imposed by the constitution of the State, and of the United States.' (Chancellor in *Lansing* v. *Smith*, 4 Wend. 9.) The public right in navigable waters was in no way affected or impaired by the change of title. The State, in place of the crown, holds the title, as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide-waters, or authorize a use inconsistent with the public right, subject to the paramount control of Congress through laws passed, in pursuance of the power to regulate commerce, given by the federal constitution. (*Rogers* v. *Jones*, I Wend. 261; *Gould* v. *H. R R. R. Co.*, 6 N. Y., 522; *The People* v. *Tibbetts*, 19 N. Y. 523.

If an exclusive right, in abridgment of the *jus publicum*, is claimed by an individual, under a statute or a public grant, the rule of strict construction, to which we have referred, applies and he must be able to show clear warrant of law in support of his claim, and inferences or implication will not be indulged in to sustain it."

Smith v. *State of Maryland*, 18 How. 71, "Whatever soil below low-water mark is the subject of exclusive property and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the declaration of independence. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Martin* v. *Waddell*, 16 Pet. 367; *Den*, v. *The Jersey Co.*, 15 How. 426.

But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking

fish, as well shell-fish as floating fish. *Martin* v. *Waddell; Den.* v. *Jersey Co.*; *Corfield* v. *Coryell*, 4 Wash. R. 376; *Fleet* v. *Hagemen*, 14 Wend. 42; *Arnold* v. *Munday*, 1 Halst. 1; *Parker* v. *Cutler Milldam Corporation*, 2 Appleton (Me.) R. 353; *Peck* v. *Dockwood*, 5 Day, 22; *Weston et al.* v. *Sampson et al.*, 8 Cush. 347. The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held. Vattel, b. I, c. 20, s. 246; *Corfield* v. *Coryell*, 4 Wash. R. 376. It has been exercised by many of the states. See Angell on Tide Waters, 145, 156, 170, 192-3."

In *Langdon* v. *Mayor, etc.*, 93 N. Y. 129, the city of New York took the lands below high water mark under the Dongan and Montgomerie charters of 1686 and 1730, with the right to build docks and wharves thereon, and to take and have the accruing wharfage. It could grant the lands to individuals with all the rights and privileges which it favored, and in the exercise of this right made the Astor grant.

"Under the two charters, and the course of legislation referred to, we have no doubt that the city acquired all the title to the land granted, which the crown of England or the state could convey, and that it also acquired all the rights to fill up such lands, and build wharves thereon, and receive the wharfage therefor, which the sovereign authority could give it.

"A grant of land by the sovereign, bounded by tide water, limits the land conveyed to high-water mark, and gives the grantee no private or exclusive rights whatever below that. (*Gould* v. *Hudson River R. R.* 6 N. Y. 522.) In such case

the grant is exclusively a conveyance of dry land, and is to be construed without reference to the water, just as if it were bounded on all sides by dry land. But when the sovereign grants land under water, which cannot, in its natural state, be subjected to any of the uses to which dry land may be devoted, then a different rule of construction must be applied to the grant, so as to make it effectual for some purpose. Such a grant may be made to give an exclusive right of fishery, or of navigation, or to enable the grantee to fill up the land for wharves and docks, or other buildings. The purpose may be plainly expressed in the grant, if it be not, then the intent of the parties must be ascertained from the nature and situation of the land granted, and all the circumstances surrounding the grant which may properly be considered for the purpose of ascertaining such intent. Here, taking the language of the charters and grants, the course of legislation, and all the statutes in *pari materia*, the situation of the lands granted and the use to which many portions of them had, with the knowledge and consent of the legislature, been from time to time devoted, it is very clear that the lands under water around the city were conveyed to it in fee, to enable it to fill them up as the interest of the city might require, and to regulate and control the wharves and wharfage.

"We think it equally clear that whatever title and property-rights the city thus obtained, it could transfer and convey to individuals. Having the power to extend the *ripa* around the city, and thus make dry land, it could authorize any individual to do it. Whatever wharves and docks it could build, it could authorize individuals to build, and whatever wharfage it could take, it could authorize individuals to take. Its dominion over the lands under water, certainly for the purposes indicated in the preamble contained in section 15 above cited, was complete."

It will be seen from the examination of this case that the grants above referred to and the legislation affecting the same were all made and done in the interest of and for the

promotion of navigation and commerce, for the uses of which, the state holds in trust the submerged lands.

This case goes much further, and declares the power of the state as the owner of the submerged lands to grant them with the power in the private grantee to obstruct or destroy navigation.

In this particular the doctrine announced is in conflict with that laid down in *Martin* v. *Waddell*, and other cases.

Nor is the case of *Webber* v. *Harbor Commissioners*, 18 Wall. 57, at variance with this idea.

The right of the state to grant to a private party, for private use, the fee of the submerged lands underlying the bay of San Francisco, was not involved in that case. The "Beach and Water Lot Act" of 1851, of the legislature of California, did not grant the fee of the submerged land. It gave to the city of San Francisco the use and occupation, for 99 years, of certain lands covered by the tide waters of the bay and lying in front of the city. It defines the outer boundary of the lands of which the use was granted, and declared that this line "shall be and remain a permanent water front of said city, the authorities of which shall keep clear and free from all obstructions whatever the space beyond said line to the distance of 500 yards therefrom."

This act also expressly reserved the right of the State to regulate the construction of docks and wharves in the harbor.

On May 1st of the same year another act was passed on the same subject, and when both acts are examined, it will be found that so far from being intended to make or confirm a grant to a private person or corporation, the grant

was one to a public corporation—one of the municipal agencies of the state government—for the purpose of the improvement and control of the harbor for the use of the public.

The contention in that case was between a private person who claimed an exclusive right, and the commissioners as the representatives of the public, and the court found in favor of the latter.

In that case, the learned judge states the law as it is admitted here, that, by the common law, "the title to the shore of the sea, and of the arms of the sea, and in the soils under the tidewater, is, in England, in the king, and in this country in the state," and "upon the admission of California into the Union upon equal footing with the original states, absolute property in and dominion and sovereignty over all soils under the tidewaters within her limits, passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government.

While the language of the last quotation concerning the right of the State to dispose of the submerged lands is quite broad, we submit that it is only to be understood as applying to the facts in that case, and these facts, as we have before shown, do not make a case of a grant by the legislature to a private person or corporation, but show

a purpose on the part of the legislature, through a public political agency, to improve, control and manage the harbor in the interests of general commerce.

In *Barney* v. *Keokuk*, 4 Otto, 324, while the question here at issue was not involved, on the discussion of a kindred question the well known rule was reiterated, that "the public authorities ought to have entire control of the great passage-ways of commerce and navigation, to be exercised for the public advantage and convenience."

In *Parker* v. *The Cutler Company*, 20 Maine, 253, the court say:

"The regulation of navigable waters within the State is vested in the sovereign power, to be exercised by laws duly enacted. The navigation may be impeded if, in the judgment of that power, the public good requires it; and if the more apparent object be the profit of the grantee, it is its right and duty to determine whether the public interest be so connected with it as to authorize the grant."

The railroad company may decline to make any constructions whatever in the harbor. It may leave it in such condition that the proper and legitimate use of it by those engaged in commerce and navigation would be impossible. The state would then have no recourse except to resume the grant by the exercise of the power of eminent domain. We deny the right of the state to grant to a private person or corporation the land comprising the roads of a county, and when they become impassable resume the grant by the exercise of the right of eminent domain. If the fee of the roads of a county were in a state, it would be held in trust for the uses and purposes of the public. The citizens of the state have the right to pass and repass

over them, and although no attempt might be made by the grantee to prevent their use by the people, still it would not be competent for the state to put out of its power the right to a constant and complete supervision of the right of travel thereon.

It has often been stated by courts that public pleasure grounds and parks cannot be made the subject of a private grant. The principle of such decisions is that the public has an interest in them, and, to a certain extent, a property interest, of which they cannot be divested by a grant made by the legislature of the state. In the case of highways, the inability of the legislature to grant the land, if it owned it, would seem to rest upon the other ground as well, that such a grant would be an abdication of the legislative power of control which the legislature must be in a position to exercise at all times. If the legislature should attempt to grant to a private corporation the land and buildings comprising the State House and its yard at Springfield, with a simple proviso that the grantee should make no use of them which would constitute obstructions to legislation, it is not believed that such a grant could be sustained. If there is a purpose to abandon the State House and remove the legislative halls to another place, it would be proper to dispose of the building and grounds as property; but so long as no purpose to abandon is evinced, but on the contrary a clear legislative intent is shown to preserve it and keep it for governmental purposes, we doubt the power of the State to confer the property upon an individual. It is public, and must remain so. There is nothing in its nature which admits of its being private

property. Much more is it so in respect to the harbor of Chicago. It is dedicated to a public use as sacred as the use of a street, a public park, or the State House at Springfield. It must, in the nature of things, be under the constant and continuous supervision of the State, and the attempt to make it the subject of a private grant without at the same time providing for its use, and the regulation of constructions which may be made in it cannot be tolerated.

It is not contended that any decision will be found in the American authorities expressly denying the right of the state legislature to make such a grant as the one attempted by the Lake Front Act. No such decision will be found for the reason that no such act or grant has been passed upon by an American court, no other corporation ever having attempted to compass such a grant, and no other legislature ever having been found so profligate of a great public trust, involving as it did, "an imperial domain," as Governor Palmer so appropriately termed it in his veto message.

For the same reason, no decision will be found expressly sustaining such a grant.

XIII.

Whatever wharfing rights and franchises may have passed by the act of 1869 were recalled by its repeal, because they were supplementary, and not original privileges, and such grants and privileges create no contract protected by the federal constitution.

If the court shall reach the conclusion that the grant of the submerged land did not carry with it the right to wharf and build piers, but that, if such right passed at all

it was by an implied license or an inference, then the revocability of the wharfing rights hardly admit of doubt. It was a privilege supplementary to the charter rights of the company, and subject to recall.

In the case of *Christ Church* v. *Philadelphia*, 24 Howard 300, the state of Pennsylvania had passed a law by which the property of Christ Church was relieved from taxation. This act was repealed, and the city of Philadelphia, after the repeal, proposing to levy upon the property of the church for taxes which had been assessed against it, was sought to be enjoined by the church, and the Supreme Court of Pennsylvania, holding that the repeal was effectual to remove the exemption, the case was taken to the Supreme Court of the United States, and the decision of the Pennsylvania court was affirmed.

In the case of *Saginaw Company* v. *Saginaw*, 19 Michigan 259, affirmed in the Supreme Court of the United States, 13 Wallace 373, the state of Michigan passed a law relieving the property of persons or corporations engaged in the manufacture of salt from taxation, and also giving a bounty of so much per bushel, upon all salt that might be manufactured within certain limits. The Saginaw Company, availing itself of the provisions of the act, expended large sums of money, was successful in discovering a salt well, and its property was relieved from taxation, and it received the bounty provided by law. Afterwards the act granting the exemption and the bounty was repealed by the legislature of the State. The right to take away the exemption by repeal was denied by the company, and the case was taken through the Supreme Court of Michigan to

the Supreme Court of the United States, and both courts held that the repealing act was effectual to remove the exemption, and to deprive the manufacturers of their bounty.

There are many other cases of the same character to which it is not necessary to refer. These two are decisions of the Supreme Court of the United States, and we are not aware that the principle has been shaken or in any way modified. That principle is that where the legislature of a state, after the organization of a corporation, and the completion of the contract created by the charter (the contract involving such terms, provisions and exemptions as may be contained in it), grants a supplementary boon or privilege, such supplemental grant creates no contract which is impaired by the repeal of the supplemental act.

In the Philadelphia case, if the church had been organized by a special charter and the exemption from taxation had been contained in the charter, it would form part of the contract which was thereby created, and a repeal of the act would be an impairing of the obligation of the contract; but, inasmuch as the exemption was conferred after the organization of the corporation and the completion of the contract, the supplementary privilege which was conferred constituted no contract which would be impaired by a withdrawal of the privilege.

In the Michigan case it was decided that the corporation which had availed itself of the provisions of the act exempting its property from taxation, and granting it a bounty, was entitled to the bounty so far as earned prior to the

repeal; but that after the act was repealed, it was entitled to no bounty, and its exemption from taxation was taken away.

The Illinois Central Railroad Company was incorporated in 1851. The contract between the State and the corporation was complete at that time. There were various provisions, conditions and exemptions contained in the charter, all of which formed a part of the contract, and none of which could be taken away by repeal without impairing its obligations. There were also amendments to the charter, and it is possible that those amendments being complete in themselves, would form new contracts which could not be abrogated by repeal; but the act of 1869, which is said to confer the privilege and franchise of wharfing on the submerged lands within the Chicago harbor, is not an amendment to the charter of the railroad company. It cannot be an amendment, because the constitution of the State forbids any such effect without expressing it in the title of the act. The counsel for the railroad company would hardly dare to call this act an amendment of the company's charter; and if the right to wharf was given, it was simply a supplementary boon or privilege conferred by the legislature of the State after the completion of the charter contract, and subject to recall by a repeal of the act; and the act was repealed in 1873. It was something extraneous, incidental, not connected with chartered rights, and it occurs in legislation upon a different subject. The title of the act is:

"An act in relation to the portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago."

There is in this title no reference whatever to an increase of power to the railroad company, and no indication of a charter contract made between the State and that company.

It may well be that if extensive constructions had been made in reliance upon the act between the time of its passage in 1869 and the time of its repeal in 1873, so far as those constructions are concerned the railroad company might be entitled to retain them, or to compensation in case they should be taken or removed by the State. The record shows that at the most, only the most northerly of the three outer piers of Randolph street was constructed before the repeal of the act in 1873. The evidence shows conclusively that between Randolph street and Park Row, no expenditure whatever was made under the act of 1869, and that the only work done was the filling in of a small triangle, which was made for the purpose of securing a more convenient access to their railroad yards north of Randolph street. There was also possibly some filling in of the water between 12th street and lot 21, but it was in front of land which the company claimed to own, and small in amount, and the reliance in that case certainly was not upon the act of 1869, but upon the riparian rights as they were claimed to exist by the company. The railroad company is not entitled to hold against the State any constructions which have been made since the repeal of the act of 1873.

But it is said that the constitution of 1870 expressly forbids a repeal of this act. In article 14 of the constitution, there is a separate section relating to this railroad company, as follows:

"No contract, obligation or liability whatever of the Illinois Central Railroad Company to pay any money into the State treasury, nor any lien of the State upon, or right to tax property of said company in accordance with the provisions of the charter of said company, approved February 10th, in the year of our Lord 1851, shall ever be released, suspended, modified, altered, remitted, or in any manner diminished or impaired by legislative or other authority; and all moneys derived from said company, after the payment of the state debt, shall be appropriated and set apart for the payment of the ordinary expenses of the state government, and for no other purpose whatever."

It may be said in respect to this claim:

First. It refers exclusively to the contract and obligation created by the charter of the company, approved February 10, 1851.

Second. That it refers to a contract, obligation or liability which was in existence at the time of the adoption of the constitution, and not to the future contracts or liabilities which might thereafter be made or incurred. This contract, if it was one, between the railroad company and the State, in respect to the submerged lands of the harbor, was not complete until after the adoption of the constitution. There was a vote taken by the board of directors of the company in the city of New York, in July, 1870. The railroad company gave formal notice of acceptance to the Secretary of State in November, 1870, and the railroad company, at a meeting of its stockholders, ratified that

action in general terms in May, 1871. The constitution of the State was in force in August, 1870.

Third. The repeal of the act of 1869 did not affect any contract, obligation or liability of the railroad company. That obligation and liability remained as before the repeal. The repealing act took away from the railroad company the right to make constructions upon a certain portion of the land mentioned in the act of 1869; and it is not to be supposed that the constitution intended by this separate section to require the legislature of the State to leave with the railroad company all the land and means of making revenue which had been conferred upon it, or which had been offered to it. If that construction should prevail it would require the State to leave open all its public lands and waters between Cairo and Chicago, and between Centralia and Dubuque, because by its charter of 1851 it was authorized to enter upon all the public lands and waters of the State for the purpose of constructing its railroad.

This separate section of the constitution of 1870 can operate in no way to affect the force of the repealing act of 1873.

It cannot, we think be successfully maintained, that the right of the railroad company to construct wharves and piers and to charge compensation therefor was not subject to recall. It was a supplementary privilege and therefore not a contract. It is as though the legislature of the State would say to the railroad company: "I will allow you to use this land, and you may construct upon it wharves and piers, and the property that you place upon it shall be

exempt from taxation, and if you lease any portion of it the lessees shall pay taxes, and you shall pay seven per cent. of the rental into the treasury of the State;" and then subsequently the legislature should be of the opinion that it was desirable that the harbor of the city of Chicago should be absolutely free, and that it would itself construct wharves and piers and the necessary aids to navigation, make them free to all the world, and should inform the railroad company that the arrangement which was made with it was not perpetual, and that it must cease on the 1st of July, 1873, and that it relinquished to the company the payment of seven per cent. of the rentals. "In respect to constructions which you have made, if you have made any, if we take them away we will pay compensation, but no further improvements are to be made, and you are relieved from the payment of the per centum mentioned in the act."

This is denominated by the railroad company repudiation and confiscation. The Supreme Court of the United States did not consider that the withdrawal of the exemption from the property of Christ's Church in Philadelphia was repudiation or confiscation, and it is a very fortunate thing for the country that the ethics of the Illinois Central Railroad Company, as exemplified in its dealings and attempted dealings in respect to the Chicago harbor, have not been adopted by the courts.

It abundantly appears in the evidence and printed document that the legislature of the State has conferred upon the city of Chicago the right to construct wharves, extend its streets as piers, and to regulate and control the harbor

of the city. This right has been repeated in various amendments to the charter from its organization to the present time. It has been in the charter all the time, and is so now. There is nothing in the act of 1869 which refers to this power of the city which had been conferred upon it by so many acts of the legislature, and there is certainly no intention evinced to repeal those acts. If the power of wharfing which has been conferred upon the city, was to be taken away forever, and given to a private corporation, it is at least very remarkable that no mention of it was made in the act. The right to wharf, if given at all to the railroad company, was a revocable right, and was recalled in 1873. A proper way of improving the harbor is by an extension of the streets as piers. This was the mode adopted in San Francisco, and it received the approval of this court.

In view of the power and jurisdiction of the State over the public domain and navigable waters in its harbors, is it not correct to say that this grant to the railroad company with a perpetual prohibition upon alienation was a *revocable* grant? The record shows that nothing was done by the railroad company in the harbor of Chicago in reliance upon and by virtue of this grant of 1869, prior to its repeal in 1873. There are, therefore, no equitable considerations to urge, and in that respect there is no reason why the repeal of this law in 1873 did not have the effect to withdraw from the railroad company whatever was given by the act. This cession by the State to the railroad company, although the words are those of a grant,

may, under the circumstances, well be called a license, and a license not acted upon is certainly revocable under the laws of Illinois.

Kamphouse v. *Gaffner*, 73 Ill.. 459.
Woodward v. *Seely*, 11 Ill., 157.
Forbes v. *Balenseifer*, 74 Ill., 183.

These cases establish the proposition that a license, whether written or by parol, is revocable at the will of the party granting it, but that where a license has been enjoyed, and the revocation would amount to a fraud upon the licensee, the licensor would be estopped from making the revocation except in respect to matters not acted upon at the time of the withdrawal. A license is in the nature of an easement, and lies in the grant. The word "grant," therefore, as used in the act, need give no trouble, and may as well be applied to a license as to a conveyance, and we have seen that the words "in fee" are deprived of their ordinary signification by the limitations of the proviso. It would seem, therefore, that if there were no other consideration but construing the act of 1869 as the words of the act permit us to do, and having in view the power and jurisdiction of the State and the necessity for its preservation, we should be justified in saying that the act of 1869 was a mere license, and the license has been withdrawn and revoked by the repealing act of 1873.

In the case of *Treat* v. *Lord*, 42 Maine, 552, the owner of land had erected a dam under the express terms of a grant for that purpose. He owned all the shore and the soil under the stream, and it was held that the public easement in the water did not pass with the grant of the

land, and that the dam was an interference with the navigation of the stream, and must be removed. The court, in the opinion, say:

"It is true the right to control, abridge, or even destroy such easement in the water, existed in the state by virtue of its sovereignty or right of eminent domain, disconnected from and not dependent upon its ownership of the land; but until so exercised by positive legislation, all persons might lawfully enjoy such easement in common with the state. The right of property is one thing, and the right to regulate and control the use of property *pro bono publico* by appropriate legislation is quite another thing. The first is property subject to be conveyed by deed or other legal mode of disposition, but the last is a part of the sovereign power itself."

CONCLUSION.

There are several questions presented by the record, touching the interests of the State that we are unable for want of time to discuss in this argument. We have had no opportunity to examine the arguments of counsel representing any of the opposing interests, and are therefore unable to review them or reply. We have presented mainly the questions which it seems to us are of vital interest, and have pressed to the best of our ability those which we regard as fatal to the claim of the railroad company to the submerged lands, a claim which we insist has not a single legal presumption in its favor.

The right of the railroad company as a riparian owner where it holds the fee to the land on the shore of the lake has not been discussed in this brief. If any such right exists it can not be disturbed.

It will be found from the record that notwithstanding the railroad company made claim to these submerged lands

for a period of many years before the commencement of this suit, all its improvements on the Lake Front and practically all its expenditures thereon have been made with reference to its supposed riparian ownership, except such as have been made upon its right of way for the purpose of improving the same.

Long before the passage of the Lake Front Act, it had become evident that the growing lake commerce of the city of Chicago would soon be unable to find accommodations in the river, and the creation of an outer harbor would become an early necessity, requiring the construction of docks, wharves and piers along the border of the lake. This necessity had already been impressed upon Congress by the lumber, grain, and other great shipping interests of the Northwest, and caused the passage by the House of Representatives of the resolution of February 17, 1869, for a survey of the port of Chicago, with a view "to secure such additional and enlarged facilities as the necessities of commere at that point deserve."

(Printed record p. 643.)

Shortly before this, January 13, 1869, Mr. Knickerbocker, a member of the House of Representatives, representing the city of Chicago in the General Assembly of the State, had introduced House Bill No. 373, for "An act to enable the city of Chicago to enlarge its harbor, and to grant and cede all rights, title and interest of the State in and to certain lands lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago." (Printed record p. 552.) The movements for the improvement of the outer harbor, in Congress and in

the State legislature, were simultaneous, and it would seem the efforts of the railroad company to possess itself of the harbor were not long delayed.

The survey of the port contemplated by the congressional resolution was made in 1869, and a plan adopted proposing to enclose an area of about 275 acres for an outer harbor. It will be seen by reference to the Lake Front Act, that the area of the submerged lands, proposed to be ceded thereby to the railroad company, embraced something more than 1,000 acres, being more than three times the area of the outer harbor, and not only including all of said harbor as contemplated by the board of engineers, but embracing all of the adjoining submerged lands, which would in all probability be included in said harbor at any time in the future.

It embraced an area several times larger than that of all the great merchandise docks along the Thames at London, three times as much as that included in the famous docks and basins at Liverpool, twice that of the port of Marseilles, and much greater than the pier area along the whole water front of the city of New York; in short, more than the improved harbor facilities of any port in the world.

The arrivals and clearings at the port of Chicago, exceed in number those of New York by about fifty per cent., and nearly equal those of New York, Boston and Baltimore combined. Chicago has nearly twenty-five per cent. of the lake carrying trade, as compared with the arrivals and clearings at all the leading ports of our great inland seas; her tonnage in 1890 was represented by the figures 8,774,-

154. When we reflect that since the passage of the Lake Front Act, in 1869, the population of Chicago has increased about 1,000,000 souls, and the increase of commerce has kept pace therewith, we will readily admit that the cupidity of the railroad company did not surpass its foresight.

It is to divest all claim of private corporate ownership of the great harbor where this immense commerce floats, and to restore it to the public where it belongs and should remain always, that the State has instituted and presses this proceeding. While well known rules will govern the application of the legal principles involved, the facts are without precedent in the records of legislative or judicial proceedings.

We agree with the learned counsel for the railroad company, that the question at issue must be decided in accordance with well settled legal principles, abstracted from every purpose or desire except to do equal and exact justice between the parties. The claim of the railroad company is that of an exclusive grant, or special privilege, against the public. The well settled legal rule in such case, is, *all such grants are construed most strongly in favor of the public, and against the claimant.*

1. It must first show that the grant was made in the manner pointed out in the constitution of the State of Illinois, and that it is competent for the legislature, of its own action, to make a valid grant of real estate and to vest complete title, without the concurrence of the Executive or the great seal of the State.

2. It must show that the passage of the act making the grant is tainted with no constitutional infirmity.

3. It must show that the subject of the act was expressed in the title, and this subject, as expressed, must be consistent with the purposes of the act as disclosed by its contents.

4. As the claimant is a corporation, it must show that it had the capacity to take the grant, and is endowed with power to hold it.

5. If it had not this capacity to so take and hold the subject matter of the grant, under its original charter, then it must show such increased capacity by an amendment properly passed and duly accepted.

6. If, in order to take and utilize the subject matter of the grant, it is necessary that the grantee be endowed with new corporate functions, it must show such endowment by a valid act.

In brief, it must show that the State had the power to make the grant, that the power was properly pursued, and that the grantee is, in all respects, capable. If it fails in any of these, the State must succeed.

Invoking these rules, we look to the court for no innovation upon established principles of law and rules of justice. While the State, as a suitor, submits to the dominion and judgment of the law as well as the private citizen, as the holder and guardian of a great public trust, it comes into court and asks that that trust be preserved for all the people. It transcends none of its rights when,

in the interest of this great trust, it challenges in a court of justice the profligate and faithless act of its own legislature.

Nor in pressing this proceeding is there aught of unfriendliness to the Illinois Central Railroad Company. As the records of this case show, the State has been generous to that corporation from the hour of its birth, to an unexampled degree, and in the favor of the State it has been without a rival. Like all corporations, the primary purpose of its organization was the promotion of the public good. Its proper place is that of a servant, not a master of the people. Fed upon public bounty until its arm had grown strong, it had no right to ask for this grant, through which it would be enabled to place its powerful grasp upon the lake commerce of the Northwest, and thereby hold this great interest of the people in a measure at its mercy.

In doing so, it attempted to subordinate the primary purpose of its creation, the public good, to the secondary purpose, the emolument of the stockholders.

For the asserted grant of the submerged lands, not one dollar has ever been paid, nor was there any contemplation in the act that a dollar was to be paid to the State by the railroad company. It is true that provision was made that from the income arising from any improvements made upon these lands, seven per cent. was to be paid into the state treasury semi-annually, but this, it will be remembered, was in lieu of taxation, and constitutes no payment for the grant. It therefore cannot properly be said that any hardship will be imposed upon the railroad company by the action of the court in declaring that the so-

called Lake Front Act and the attempt therein to grant these lands to the railroad company, never had any force as a law.

The fact that the railroad company has the ability to improve the harbor, and that it does not now appear that either the state of Illinois or the city of Chicago has attempted to make these improvements, can have no weight in the consideration of this case.

This is a claim made by a corporation against the public—a claim involving largely increased corporate powers and a grant of public property of almost incalculable value, and this claim, we insist, must be made good by the company by showing a valid act granting to it what it claims. Unless this can be done with such affirmative force as to clearly show that the company is entitled to all it claims, it cannot succeed.

Should its claim be sustained, it has the exclusive right to construct docks, wharves and piers, and to make other improvements in the harbor of the city of Chicago, and its hold upon the commerce of the city is secured forever. It is unnecessary to say that a claim of this character should receive no favorable consideration in any court unless by the force of absolute, positive, unquestioned law.

We believe that no instance exists in this country where the harbor of a great city and its commerce have for all time been allowed to pass into the control of any private corporation, nor do we believe that the city of Chicago will be the first place where such an attempt to own and control a harbor, which should belong to the public and be free to all, will be upheld by the court.

GEO. HUNT,
Attorney-General, State of Illinois.

In the Supreme Court

October Term,

The Illinois Central Railroad Company, appellant,
vs.
The People of the State of Illinois and the City of Chicago.

The City of Chicago, appellant,
vs.
The Illinois Central Railroad Company et al.

The People of the State of Illinois, appellants,
vs.
The Illinois Central Railroad Company and the City of Chicago.

The United States, appellants,
vs.
The People of the State of Illinois et al.

Appeals from the Circuit Court of the United States for the District of Illinois.

Motion to dismiss appeals.

called Lake Front Act and the attempt therein to grant these lands to the railroad company, never had any force as a law.

The fact that the railroad company has the ability to improve the harbor, and that it does not now appear that either the state of Illinois or the city of Chicago has attempted to make these improvements, can have no weight in the consideration of this case.

This is a claim made by a corporation against the public—a claim involving largely increased corporate powers and a grant of public property of almost incalculable value, and this claim, we insist, must be made good by the company by showing a valid act granting to it what it claims. Unless this can be done with such affirmative force as to clearly show that the company is entitled to all it claims, it cannot succeed.

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GEO. HUNT,

Attorney-General, State of Illinois.

146 US 387

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FILED.
OCT 11 1892
JAMES H. McKENNEY,
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In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE ILLINOIS CENTRAL RAILROAD COMPANY, appellant,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS and the City of Chicago. } No. 419.

THE CITY OF CHICAGO, APPELLANT,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY *et al.* } No. 608.

THE PEOPLE OF THE STATE OF ILLINOIS, appellant,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY and the City of Chicago. } No. 609.

THE UNITED STATES, APPELLANT,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS *et al.* } No. 610.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO STRIKE OUT, ETC.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE ILLINOIS CENTRAL RAILROAD COMPANY, appellant,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS and the City of Chicago. } No. 419.

THE CITY OF CHICAGO, APPELLANT,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY *et al.* } No. 608.

THE PEOPLE OF THE STATE OF ILLINOIS, appellant,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY and the City of Chicago. } No. 609.

THE UNITED STATES, APPELLANT,
vs.
THE PEOPLE OF THE STATE OF ILLINOS *et al.* } No. 610.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO STRIKE OUT, ETC.

The United States comes, by Charles H. Aldrich, Solicitor-General, and respectfully suggests and represents

to the court that in the above-entitled record the United States should not appear as an appellant, and that the name of the United States as such appellant should be stricken from said record.

It will appear from an inspection of the record that no appearance was entered for the United States in the court below, and no pleadings filed or hearing had in its behalf. The only reference to the United States contained in said record, so far as the Government is advised, is found on page 226 thereof, and is in the words following, to wit:

> THE PEOPLE OF THE STATE OF Illinois
> *vs.*
> THE ILLINOIS CENTRAL RAILroad Company *et al.* } In chancery.
>
> Now comes the United States of America, by William G. Ewing, United States attorney for this district, and prays an appeal from the decree herein to the Supreme Court of the United States, which is allowed.

It is suggested that there is no act of Congress which authorized the district attorney to appear in said suit, and that at the same time the United States had pending in said court an information, to which a demurrer was sustained, and an appeal prosecuted to this court, where the same is now pending and undetermined, being case No. 587 on the docket of this court; and that, without such act no direct proceedings against the United States would lie at the suit of any of said parties to said record; and that such officer had no power to waive its privilege in this respect, and could not law-

fully consent that the United States should become a party to said decree.

The United States does not dismiss its alleged appeal in said cause, because it is contended in its behalf that it is in no respect a party to said record.

Wherefore the court is respectfully asked to make a proper order herein so that none of the rights of the United States may be affected by any decision reached in said cause, and that all questions may be reserved until the appeal of the United States upon the ruling heretofore referred to shall be reached and heard.

Respectfully submitted.

CHARLES H. ALDRICH,
Solicitor-General.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1892.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS AND OTHERS,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

BY

JNO. N. JEWETT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS AND OTHERS,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

The statement, prepared by the general counsel for the appellant, is accepted as a full and fair condensation of the facts and issues presented by this record. It brings together with remarkable clearness and precision the relations of the several parties to the subject-matter of the pending controversy, and will greatly relieve and assist the court in its understanding of the essential features of the case. In connection with the statement, the maps and prints which are attached to and made a part of the record, will enable the court to readily comprehend the location of the premises, which are involved in this proceeding, and the changes which took place in them and their surroundings between the

years 1820 and 1870. These maps and prints are of themselves a visual history, showing how the little trading post, early located on the south-western shore of Lake Michigan, at the mouth of what is now known as the Chicago river, gradually developed into the considerable city that it was, when the elements of the pending controversy first began to be developed. Many of the changes alluded to were natural, or the result of natural causes, supplemented in their action by the influence of harbor improvements, undertaken and prosecuted by the general government. Others are directly attributable to the pushing energies of a young and rapidly growing community, in its endeavors to render an unpromising location available for the habitation of men, and the accommodation of the business which was rapidly accumulating about it.

Such changes, necessarily, are interwoven with changes of public and private interests, and, out of them, grow conflicting claims of right, more or less substantial *in appearance* if not in fact, which the courts are ultimately called upon to settle. Legislation also, occasionally, comes in to disturb and embarass the adjustment of conflicting claims, or *to start a claim*, which would otherwise be without support, and complications are thus added to a judicial adjustment, which, in the absence of legislative interference might not have been difficult. The present case involves something of all these elements of controversy, which have, for more than twenty years, held in check, in respect to a considerable part of the premises in question, the development of a property interest possibly important in its relations to both public and private advantage.

In the suggestions I have to offer, I shall endeavor to

supplement, so far as I can, and *in my own way*, the able argument of the general counsel of the appellant. Something of duplication will however be unavoidable.

BRIEF OF ARGUMENT.

I.

The common law doctrine in respect to the ownership, control and right of disposition of land under tide waters prevails in this country and is, by repeated decisions of this court, made applicable to the bodies of fresh water, denominated "Great Navigable Lakes," which are treated as "Inland Seas." The rule in respect to all such bodies of water is, that the title and right of disposition of the land under the waters, within their respective jurisdictions, are vested in the several states by virtue of their sovereignty as such states.

Manchester v. *Massachusetts*, 139 U. S., 240.
Smith v. *Maryland*, 18 How., 71.
M'Cready v. *Virginia*, 94 U. S., 391.
Martin v. *Waddell*, 16 Peters, 367.
Den v. *New Jersey*, 15 How., 26.
Hardin v. *Jordan*, 140 U. S., 371-382-3
Goodtitle v. *Kibbe*, 9 How., 471.
Doe v. *Beebe*, 13 How., 25.
Pollard's Leesee v. *Hagan*, 3 How., 212.
Mumford v. *Wardell*, 6 Wall., 436.
Weber v. *Harbor Com'r's*, 18 Wall., 57.
County of St. Clair v. *Lovingston*, 23 Wall., 68.
Barney v. *Keokuk*, 94 U. S., 338.
The Genesee Chief, 12 How., 443.

The case of *Hardin* v. *Jordan*, 140 U. S., 371, cannot be considered as affecting the general doctrine of the proposition in its application to the present case.

II.

One of the exceptions taken to the decree of the Circuit court questions the correctness of that decree, in respect to the right of riparian owners, and the authority of the court, as such, to put limitations upon such rights. The exception relates to that part of the premises covered by the original and amended informations, which are situated on the shore of Lake Michigan, between the Chicago river and Randolph street, and especially between Park row or 12th street, as shown upon the various maps, and 16th street, the title to which in fee, the Illinois Central Railroad Company *acquired* long before the present controversy arose. The decree undertakes to fix, *by judicial determination alone*, a limitation upon the right of the company to construct wharves and docks in the shallow waters of the lake in front of its own property, *in the absence of any regulation, either state or national.* This part of the decree is objected to.

The rule is that the riparian owner, in the absence of restrictive legislation, has the right to connect his shore line, by means of wharves, piers or docks, constructed in the shallow waters immediately bordering upon his land, with the waters which are navigable in fact, in his own interest as well as in the interest of the public.

The following adjudications seem most conclusively to sustain this proposition:

Yates v. *Milwaukee*, 10 Wall., 497.
Weber v. *Harbor Com'rs*, 18 Wall., 57.

Dutton v. *Strong*, 1 Black, 25.
Railroad Company v. *Schurmeir*, 7 Wall., 272.
Walker v. *Shepardson*, 4 Wis. 486.
Delaplaine et al. v. *C. & N. W. Ry. Co.*, 42 Wis., 214.
Blackstone's Com., Vol, 2, p. 261.
Kent's Com., Vol. 3, p. 428.
Gould on Waters, Sec. 155.
Washburn on Real Property, Vol. 3, p. 58.
Lovingston v. *Co. of St. Clair*, 64 Ill., 50.
Co. of St. Clair v. *Lovingston*, 23 Wall., 46–68.

III.

The making, certification, acknowledgment and recording of the maps and plats of the subdivision of the south fraction of Section 10, Town, 39, N., R. 14 East in 1839, under the name of "Fort Dearborn Addi-"tion to Chicago," by authority of the United States, and the sale and conveyance of all the lots designated upon that map or plat, *divested* the United States of all jurisdiction and authority over the land so subdivided and sold, and of the incidents of ownership pertaining to the lands. The sovereignty and jurisdiction thereby passed to the State of Illinois, the ownership of the lots conveyed, to the purchasers, and the title to the streets, alleys and public grounds designated on the plat, to the municipal corporation of Chicago, *in trust for the use of the public.*

The same results as to title and ownership followed from the platting of fractional section 15, and the execution, certification, acknowledgment and recording of the

plat by the canal commissioners, by authority of an act of the legislature of Illinois, under the name of "Fractional Section 15 Addition to Chicago," and the sale of the lots in said addition, in accordance with the plat. The sovereign authority of the state (whatever that may mean) over the premises, still, however, remained unaffected by the subdivision and transfer of title.

The city of Chicago took the title of the streets and public grounds as an agency of the state for local government. The city, being a mere governmental AGENCY, *acquired nothing distinctively its own, in the sense of* PRIVATE OWNERSHIP.

It represented merely a naked legal title, with such authority over the RES *as was embraced within its delegated powers. Every act of the city within these powers absolutely accomplished, the state should respect. Every power of agency, unexecuted, is subject to revocation, either expressly or by implication.*

City of Chicago v. *Rumsey*, 87 Ill., 355.
Matthiessen v. *City of Peoria*, 117 Ill., 411.
Harris v. *Board of Supervisors*, 105 Ill., 445.
The Hartford Bridge Co. v. *E. Hartford*, 10 How., 511-534-6.
United States v. *City of Quincy*, 4 Wall., 535-36.
Canal Trustees v. *Haven*, 11 Ill., 554.
Hunter v. *Middleton*, 13 Ill., 50.
Hunsaker v. *Borden*, 5 Cal., 288.
Bailey v. *The Mayor, etc.*, 3 Hill, 531-539.

IV.

Rights, whether individual or corporate, relate back to the date of their acquisition. They may have their limitations, territorially or otherwise, and those limitations will follow them through all the changes which may subsequently intervene. Such changes, whether from natural or artificial causes, may render the right increasingly valuable, or gradually take away from it all the value it may seem to have had; but the right, whatever its scope, once established, cannot arbitrarily be set aside, either by legislation or by courts.

V.

The making and recording of the plats of fractional section 15 addition to Chicago, and of Fort Dearborn addition to Chicago, and the sale of all the lots in those additions, in accordance with those plats, divested the former owners, although they were the state in one case, and the United States in the other case, of all their right, title and estate as individual proprietors in said additions, including the streets and public grounds, and the sovereignty and jurisdiction of the United States over the land comprising Fort Dearborn Addition, was by the plat and the record of it and the sale of the lots, absolutely extinguished. *In the making and recording of these plats, the state and the United States were acting as private owners, and subject to the law to the same extent that a citizen would be.*

Cases above cited, and also

City of Dubuque v. *Maloney*, 9 Withrow, (Ia.), 450.

City of Cincinnati v. *White's Les.*, 6 Peters, 431.

Rowan's Exec. v. *Portland*, 8 B. Monroe, 232.

Livingston v. *Mayor of N. Y.*, 8 Wend., 106.

Wyman v. *Mayor of N. Y.*, 11 Wend., 487.

New Orleans v. *United States*, 10 Peters, 710.

There is a broad distinction between sovereignty and jurisdiction in a political sense and ownership. A state may part with its title to land or water, or land under water, without losing anything of its political jurisdiction over the premises conveyed.

VI.

The Illinois Central Railroad Company, by its charter, was granted not only a right of way 200 feet in width, through the lands and waters of the state, but also was authorized to take possession of and use, for specified purposes, any lands, waters, materials and privileges, belonging to the state, and by condemnation to acquire such as the state did not own and control.

Especial reference is made to Secs. 3 and 15 of Ill. C. R. R. Co.'s charter (Rec., 611 to 613).

VII.

The concluding clause of the eighth section of the charter of the Illinois Central Railroad Company (Rec., 614), is no limitation upon the powers of the company, except

as to the location of its main tracks and general route, within the limits of an incorporated city. The incidental necessities of such a location follow as a matter of course, and are fully provided for by the charter. In respect to those incidental necessities of the road, the city authorities are without jurisdiction, so long as they do not encroach upon the streets and public grounds, the supervision and control of which are vested in the city.

VIII.

It is not true that the city of Chicago ever held title to any part of the land under water along the East frontage of the city. To suppose that it did, would be to question the doctrine, that the land under the waters of Lake Michigan belonged to the state. And no grant of title from the state to the city of such land has ever been made. But this question is perhaps immaterial in the present case, for a grant by the state would divest the title of the agency of the state for all practical purposes, and would, at least, estop the agency (the city) from claiming title as against the grantee.

The filling in of the land under water after the great fire of 1871, out to the breakwater of the Illinois Central Railroad Company, did not change either the public or the private interest.

IX.

The act of the general assembly of April 16, 1869, entitled "An Act in relation to a portion of submerged lands and "Lake Park grounds, lying on and adjacent to the shore "of Lake Michigan on the Eastern frontage of the city

"of Chicago" and commonly known (and hereafter called) "the Lake Front Act," was a valid act of legislation, passed in a constitutional way, and must be given effect to as such. To this extent, the opinion of Mr. Justice Harlan, and the decree entered by his direction in this case, support the contention of the Illinois Central Railroad Company.

See also

Supervisors of Schuyler Co. v. *The People*, 25 Ill., 163;

Wabash Ry. Co. v. *Hughes*, 38 Ill., 174–186.

X.

The Illinois Central Railroad Company was in no need of "the Lake Front Act" as a confirmatory act. Its rights, so far as covered by the act, as a confirmatory one, were fully protected by its original charter. The confirmation was a recognition of its existing rights. A grant, originally complete, is not made stronger by a subsequent confirmation. Still, accepting the act of confirmation, with all its consequences, it is respectfully insisted that confirmation of existing rights was not the chief purpose of the act itself. This may be safely assumed from its positive provisions.

XI.

The Lake Front Act, coupled with the acceptance of it, made a completed grant, in accordance with its terms, taking effect IN PRESENTI. *No further act on the part of the state was required, nor was it necessary, to perfect the grant.*

Rutherford v. *Greene's heirs*, 2 Wheaton, 196.

Harris et al. v. *Board of Supervisors*, 105 Ill., 5.

Lavelle v. *Strobel*, 89 Ill., 370.

XII.

The necessity of the Illinois Central Railroad Company for greater accommodations for the handling of its business at the Chicago station must be conceded under the testimony. This necessity is not affected by the fact that other lines of railroad were and are accommodated, so far as practicable, upon its terminal grounds.

C. & W. I. R. R. Co. v. *I. C. R. R. Co.*, 113 Ill., 156.

C., R. I. & P. R. R. Co. v. *Smith*, 111 Ill., 373.

Kipp v. *N. Y. & H. R. R. R. Co.*, 67 N. Y., 227.

C. R. & P. Ry. Co. v. *Town of Lake*, 71 Ill., 333.

C., B. & Q. R. R. Co. v. *Wilson*, 17 Ill., 373.

Richards v. *Scarborough Pub. M. Co.*, 23 Eng. L. & Eq., 343.

Page v. *Heimberg*, 40 Vt., 81.

Calloway & Co. v. *Clark*, 32 Mo., 305.

Phil. W. & B. R. R. Co. v. *Williams*, 54 Pa. St., 103.

Ford v. *Chi. & N. W. Ry. Co.*, 14 Wis., 609.

Old Colony R. R. Co. v. *Evans*, 6 Gray, 25.

Morawetz on Private Corporations, Sec. 327.

XIII.

The Act of the General Assembly of the State of Illinois, of April 15, 1873 (Rec., 609), purporting to repeal "The Lake Front Act" of April 16, 1869, WAS ABSOLUTELY VOID, *and did not and could not operate to divest the title and rights of the Illinois Central Railroad Company, granted to it by the earlier act, the provisions of which it had formally accepted and acted upon.*

Fletcher v. *Peck*, 6 Cranch, 87.

New Jersey v. *Nelson*, 7 Cranch, 164.

Terrett v. *Taylor*, 9 Cranch, 34.

U. S. v. *Quincey*, 4 Wall., 535.

ARGUMENT.

I.

The common law doctrine in respect to the ownership, control and right of disposition of land under navigable waters prevails in this country, and by repeated decisions of this court is made applicable to the bodies of fresh water denominated "The Great Lakes," which are treated as inland seas. The rule as to such bodies of water, is that the land under the water, within their respective jurisdictions belongs to and is subject to the control and disposition of the several states, by virtue of their sovereignty as such states. The public right of using the waters for purposes of navigation and commerce is of course reserved.

This proposition is fully asserted and admitted in all the pleadings in this case. The amended information (Rec., 46, 47), after setting forth the cession of the north-western territory by Virginia to the United States, and the organization and boundaries of the State of Illinois, contains this averment: "And that by virtue of said act "of cession, the conditions thereof, and the performance "of those conditions as above recited, the State of Illi-"nois acquired as well the jurisdiction over *as the soil of* "*the bed of Lake Michigan* within the boundaries of the "state, *and the right, title, power and authority in, to and* "*over the same absolutely and completely*, subject only to "the right of the United States to supervision over the "navigable waters of the lake so far as may be neces-"sary in exercising its right to regulate commerce," etc. Further on in the same amended information (Rec., 66),

after setting out, by way of pretense, the doings of the Illinois Central Railroad Company, this language is used: "Your informant states that these claims and "public outgivings of the said railroad companies, are a "great and irreparable injury to the State of Illinois, as "a *proprietor and owner of the bed of the lake, throwing* "*doubts and clouds upon the title thereto, and preventing* "*an advantageous sale or other disposition thereof.*" The remainder of the paragraph of the information may be read as a statement of the *animus* of the information.

These averments, so far as they relate to original title and ownership, and to the right of control and disposition over the land under the waters of Lake Michigan, are admitted by the answer of the Illinois Central Railroad Company, and are not seriously called in question by any pleading in the case; but even if it were, the authorities which must be respected, would seem to be entirely in harmony with the averments and admissions.

The ownership and right of disposition over the submerged lands within the limits of the State of Illinois, and especially the bed of Lake Michigan, so far as within the territorial limits of the state, so clearly asserted in the information *and made the basis of the prayer for relief*, are, also, the foundation of rights claimed by the Illinois Central Railroad Company, and are set up in the answer to the information by way of defense to the demands made by the state against it in these proceedings; *for it is through the state*, that the company, in part at least, claims the rights which it is now insisting upon, and those rights are confessedly dependent upon the *original title* of the state and its right to make conveyance or other disposition of the title and interests originally held by the state in the premises in controversy, in respect to which the railroad company is alleged to be an intruder, if not a trespasser.

It is therefore apparent, that the state, the city of Chicago and the railroad company, start upon the examination of their respective claims of right from the same conceded premises, so far as those claims have relation to the ownership of and right of control over the submerged lands. That the parties and their counsel are not mistaken in their starting point, may be illustrated by reference to a few well considered cases.

In *Martin et al.* v. *Waddell*, 16 Peters, 410, the court, speaking by Ch. J. TANEY, says: "When the "revolution took place, the people of each state became "themselves sovereign; and in that character hold the "absolute right to all their navigable waters and the soils "under them, for their common use, subject only to the "rights since surrendered by the constitution."

In *Pollard, lessee*, v. *Hagan*, 3 Howard, 212, the opinion adopts the quotation above made from *Martin* v. *Waddell* (p. 229), and adds: "Then, to Alabama belong "the navigable waters and soils under them in contro- "versy in this case, subject to the rights surrendered by "the constitution to the United States. *And no compact* "*that might be made between her and the United States* "*could diminish or enlarge these rights.*"

The doctrine of *Martin* v. *Waddell* was again affirmed in the case of *Den* v. *New Jersey*, 15 Howard, 432, and in the cases of *Goodtitle* v. *Kibbe*, 9 Howard, 471, and *Doe* v. *Beebe*, 13 Howard, 25, the case of *Pollard* v. *Hagan* is cited as controlling and approved.

In *Mumford* v. *Wardell*, 6 Wall., 436, the opinion of the court, delivered by Mr. Justice CLIFFORD, says: "*Settled rule* of law in this court is, that the shores of "navigable waters and the soil under the same in the "original states *were not granted by the constitution to the*

"*United States, but were reserved by the several states,* "*and that the new states, since admitted, have the same* "*rights, sovereignty and jurisdiction in that behalf as the* "*original states possess, within their respective borders.*" And reference is again made to *Pollard* v. *Hagan.*

In *Weber* v. *Harbor Com'rs.*, 18 Wall, 57, the court by Mr. Justice FIELD (pp. 65, 66) says: "Upon the ad- "mission of California into the Union upon an equal "footing with the original states, *absolute property in* "and dominion and sovereignty over all soils under the "tide waters within her limits, passed to the state *with* "*the consequent right to dispose of the title to any part of* "*said soils, in such manner as she might deem proper*, sub- "ject only to the paramount right of navigation over the "waters," etc.

In *Barney* v. *Keokuk*, 94 U. S., 324, a very elaborate examination of the question of the ownership of soil under navigable waters seems to have been presented in the briefs of counsel, and Mr. Justice BRADLEY, who prepared the opinion of the court (pp. 237-8) says:

"It is generally conceded, that the riparian title at- "taches to subsequent accretions to the land affected by "the gradual and imperceptible operations of natural "causes. But whether it attaches to land reclaimed by "artificial means from the bed of the river, or to sudden "accretions produced by unusual floods, is a question "which each state decides for itself. By the common "law, as before remarked, such additions to the land in "navigable waters belong to the crown; but as the only "waters recognized in England as navigable were tide- "waters, the rule was often expressed as applicable to "tide-waters only, *although the reason of the rule would* "*equally apply to navigable waters above the flow of the*

"*tide;* that reason being, that the public author-
"ities ought to have entire control of the great passage-
"ways of commerce and navigation to be exercised for
"the public advantage and convenience. *The confusion*
"of navigable with tide-water found in the monuments
"of the common law, prevailed in this country, notwith-
"standing the broad difference between the extent and
"topography of the British island and that of the Ameri-
"can continent. It had the influence, for two genera-
"tions, of excluding the admiralty jurisdiction from our
"great rivers and inland seas; and under the like influ-
"ences it laid the foundation, in many states, of doctrines
"with regard to the ownership of the soil in navigable
"waters above tide-water, *at variance with sound princi-*
"*ples of public policy.* Whether, as rules of property, it
"would now be safe to change these doctrines, where
"they have been applied as before remarked, is for the
"several states themselves to determine. *If they choose*
"*to resign to the riparian proprietor rights which prop-*
"*erly belong to them in their sovereign capacity,* it is not
"for others to raise objections. *In our view of the sub-*
"*ject, the correct principles were laid down in Martin* v.
"*Waddell,* 16 Pet. 367, *Pollard's Lessee* v. *Hagan,* 3
"How., 212, *and Goodtitle v. Kibbe,* 9 *id,* 471. *These*
"*cases related to tide-water it is true; but they enunciate*
"*principles, which are equally applicable to all navigable*
"*waters. And since this court, in the case of The Genesee*
"*Chief,* 12 *id.* 443, has declared, *that the great lakes*
"*and other navigable waters of the country, are, in the*
"*strictest sense, entitled to the denomination of navigable*
"*waters, and amenable to the admiralty jurisdiction, there*
"*seems to be no sound reason for adhering to the old rule*
"*as to the proprietorship of the beds and shores of such*

"*waters. It properly belongs to the states by virtue of* "*their inherent sovereignty, and the United States has* "*wisely abstained from extending* (*if it could extend*) *its* "*survey and grants beyond the limits of high water.* The "cases in which this court has seemed to hold a contrary "view depended, as most cases must depend, on the "local laws of the states in which the lands were situated. "In Iowa, as before stated, *the more correct rule* seems "to have been adopted after a most elaborate investiga- "tion of the subject."

Reference is then made to several Iowa cases.

A few suggestions as to that part of the opinion of Mr. Justice Bradley, which relates to the right of the states to settle for themselves the title to land under navigable waters, may not be impertinent or improper. It is understood, that as to the ownership of the land under the waters of the Mississippi river, within the jurisdictions of the States of Iowa and Illinois, the decisions of the courts of the two states are quite at variance—the courts of Iowa holding that the land belongs to the state, and the Illinois courts holding that it belongs to the riparian owners. The opinion of Mr. Justice Bradley approves of the holding, in this respect, of the Iowa courts. If, therefore, I should assert that the decisions of the Illinois courts were wrong, I should have the support of the opinion of this court for the assertion. But a further suggestion. *A court cannot make or unmake a vested title.* The courts of a state are not the representatives, either of the political power of the state, or of its proprietary interests. *The states assert their jurisdiction and title through their legislative department, and unless the state itself is a party to the proceeding, the judgment of a court cannot affect its proprietary rights.* It is not

within the legitimate functions of the judiciary to change or encroach upon a rule of the common law or to pervert its reasonable application. To attempt to do this would be an attempt at judicial legislation and a usurpation of legislative powers. The decisions of the Illinois courts, in respect to the title of land under navigable waters are nugatory. They cannot conclude the state, nor should they be accepted by this court as the law of Illinois. State courts cannot give away or authoritatively abandon the patrimony and property rights of the state. They can make no grant or lease or other disposition of public rights. Their duties are confined to the administration of the law, as it is, and they do well when they keep within this limitation. Tide-waters, as a limitation upon the ownership of land under navigable waters, or as a limitation of federal jurisdiction, has no reasonable support, since the decision of this court in the case of the Genesee Chief, 12 Howard, 443, which has been constantly adhered to by this court down to the present time and for more than forty years.

But this criticism upon the decisions of the Illinois court is, perhaps, unnecessary for the purposes of this case, for the Illinois court has not extended the doctrine of riparian ownership to land under the navigable waters of Lake Michigan.

In *Seaman* v. *Smith*, 24 Ill., 521, the Illinois Supreme court was confronted with the question, solely between individual claimants, as to the extent of the title conveyed by a deed of land, one of the boundaries of which was the course (or shore line) of Lake Michigan, and the court, so far as can be gathered from a somewhat obscure and unsatisfactory opinion, adopts the rule of the common law as to the ownership of lands under *navigable*

waters, and makes application of it to land under the waters of Lake Michigan, intimating, at least, a distinction between *running rivers* and the lake in this respect. And in the case of *Trustees of Schools* v. *Schroll et al.*, 120 Ill., 509, this distinction is extended to smaller interior lakes or ponds, in which there is no regular or perceptible current.

But more than this, the state, in its sovereign capacity, is here before the court, claiming and insisting upon its original and inherent proprietorship of the land under the waters of Lake Michigan, and its absolute right, not only of jurisdiction, but also of title and right of control and disposition over the land. In other words, the State of Illinois is now, for the first time, asserting its ownership and right of control and disposition over the land within its boundaries under *navigable* waters. *And if its grants have not precluded it from making the assertion, there is nothing, in the opinions of the Supreme Court of Illinois, which can prevent the judicial enforcement of its claims in this respect.*

This court holds, as a fundamental proposition, growing out of the organization of states, *that the states themselves take the title to and right of disposition over, the lands under navigable waters, without reference to the ebb and flow of the tide;* the State of Illinois took this title and right of disposition upon its organization as incident to its sovereignty as a state.

The State of Illinois never entrusted the disposition of its property rights to the courts. It may well, then, be asked, what was the source of the decisions of the Illinois courts? There is one and a sufficient answer to this inquiry. It began, with an opinion, very unsatisfactory,

in view of the present condition of the law, of Justice Scates of the Illinois Supreme Court, in the case of *Middleton* v. *Pritchard*, 3 Scammon, 510, in which the *tide-water* theory of ownership of lands under navigable waters, was the controlling element. The state was not a party to that proceeding and therefore is not concluded by its results. Chancellor Kent, in a note to one of the earlier editions of his commentaries, complimented this opinion of the Illinois court, as a vindication of the old *tide-water theory* of navigability, *which has long since passed out of sight.* Both Chancellor Kent and Judge Scates wrote, before the hide-bound theory of the English law, as to the controlling effect of tide-water as a limitation of public ownership had been effectually dissipated. It is true, the opinion of Judge Scates says that the State of Illinois has adopted the common law of England as a rule for the determination of personal rights; but it omits to state the important qualification, viz: *That the common law is adopted only so far as "it is applicable and of "a general nature,"* the language of the adoption being: "That the common law of England so far as the same is "applicable and of a general nature, and all statutes and "acts of the British Parliament made in aid of and to "supply the defects of the common law prior to the "fourth year of James the First, excepting, etc. * * * "and which are of *a general nature and not local to that "kingdom*, shall be the rule of decision and shall be con- "sidered as of full force *until repealed by legislative "authority.*"

Hurd's Revised Statutes of Ill., Chap. 28.

This adoption of the common law is only partial and qualified. It excludes all theories of the common law, which are not general, or are local to the kingdom of

Great Britain, *and are not applicable to the condition of things existing in this country.* These are features of the statute, adopting the English common law, which the opinion of Justice Scates absolutely ignores, and those features become essential elements of interpretation in connection with the opinions of this court above referred to, which emphatically decide that the tide-water theory of navigable waters is *inapplicable to the conditions existing in this country.* The *insular* doctrine of the common law, in this respect, does not meet the conditions of the "American Continent," and, therefore, it is not the law of Illinois—some opinions of its courts to the contrary notwithstanding. A false doctrine, or a false application of a true one, may be well corrected at the first opportunity.

But there is another suggestion, which seems appropriate in this connection; it is the old and well-established doctrine of the common law, applicable here as elsewhere, *that land cannot pass as appurtenant to land.* This may not be questioned; but the decisions of courts, inharmonious, and many times misleading, have not always well or carefully distinguished between a title to lands under navigable waters and the rights of a *riparian owner*, consequent upon and flowing directly from his *riparian ownership.* It would be impossible, within the reasonable limits of a printed argument, to review all the cases, or even a fraction of them, for the purpose of pointing out how and when this confusion of things, absolutely distinct, has been wrought into judicial opinions. The recent case in this court of *Hardin* v. *Jordan*, 140 U. S., 371, may be an illustration. In that case, the facts of which must be fresh in the minds of the members of the court, the briefs of counsel, as reported, show a citation of several hundred

decisions, fairly divided, perhaps, between the respective parties, and yet the opinion of the court, including the dissenting opinion, scarcely leaves a mark to indicate the distinction above suggested.

II.

The owner of land bounded by meandered waters, especially when those waters are what the law denominates navigable (and this is confessedly the condition of the present case) acquires and is subject to the possible contingencies of an uncertain and shifting boundary. The water line, whether high or low water mark, or the intermediate and usual level of the water, is now immaterial. His boundary is the water line. That line may diminish the area of his ownership, or it may enlarge that area. He accepts the possibilities of decretion as well as the chances of accretions from causes which may naturally, and in the progress of development, occur. In addition to this, he has the right, clearly recognized by the decisions of this court, to connect his shore line, by means of piers or other suitable structures, through the open and shallow waters adjacent to his premises, with waters which are navigable in fact, for commercial purposes, either in his own interest, or in the interest of the public; PROVIDED, *such structures do not interfere with the general use of the waters for purposes of navigation, and unless limitations are fixed by legislation either state or national in this respect.*

The antagonism between the opinions of this court and the opinions of the Supreme court of Illiinois in respect to the *actual* title to land under navigable waters

and the *actual* title thereto, which can be made through a patent from the United States to a purchaser, whose boundary is the shore line of such waters, need not be further considered than by referring to *Canal Trustees* v. *Havens*, 11 Ill., 554; *Ensminger* v. *The People*, 47 Ill., 384, and *The City of Chicago* v. *Laflin et al.*, 49 Ill., 172, in all of which the *tide-water theory* of navigability is insisted upon, and the doctrine, *not of actual grant by the general government under and by virtue of its patent, but of the natural and incidental rights of riparian ownership, are insisted upon as the foundation of claims to the use of lands under rivers within the boundaries of the state.* I have substantially stated above, that in the Illinois cases, which attempt to divest the state of its title to land *under waters navigable in fact*, solely by a judicial opinion, following a false and assumed applicability of the English common law, the state itself has not been a party. This statement requires a qualification, viz: In the case of *Ensminger* v. *The People, etc.*, the state was a party, but there was no question, in that case, which called for an assertion of the rights and title of the state in the land under the waters of the Mississippi river beyond the line of low water. The question was as to the rights of the *riparian owner*, not in respect of his title, but in respect of his incidental rights. The court, however, *arguendo*, absolutely adhered to the common-law rule, ignoring its inapplicability, and refused to correct its obvious error. It was not able to see a distinction between a theory and a principle—a distinction which that court may never understand until its methods of business are changed.

But, letting these suggestions go for what they are worth, all the opinions of the courts of Illinois give to the

riparian owner very liberal allowances by reason and as the exact consequence of his riparian ownership.

There is no intimation in any of the decisions of those courts, *that they can fix the boundries and limitations of riparian rights.* According to those decisions, the rights of the riparian owner spread themselves out over everything in front of his shore line, bordering upon rivers or running waters, within the jurisdiction of the state, whether navigable in fact or not. The doctrine of the court is, however, confined to rivers or running waters. It does not include Lake Michigan which is an inland sea, to which the common law tide-water theory of navigability confessedly does not apply, *or any smaller lake without a current or regular flow.*

As to all those parts of the premises in controversy which lie in front of the lands bordering upon Lake Michigan, the title to which has been acquired in fee by the Illinois Central Railroad Company, the company claims such right in the soil and waters of the lake, as, by law, are attached to *riparian ownership.* The parts of said premises, falling within this description, are those parts lying between the South pier of the Chicago river and the North line of Randolph street, a distance of about 1,365 feet, and between Park Row and the southern limits of the premises described in the information at or near 16th street—a distance of about 2500 feet. The decree of the Circuit court respects the riparian rights of the company North of Randolph street, but only so far as it has been availed of, and is very restrictive of those rights South of Park row. In this it is insisted that the decree is erroneous.

In Gould on Waters, Sec. 148, it is said: "Riparian "rights, according to the strict meaning of the term, are

" such as follow or are connected with the ownership of " the banks of streams or rivers. Those whose lands " border upon tide waters are called 'littoral' proprie- " tors, and there appears to be no word or phrase of suf- " ficiently broad meaning to include both riparian and " littoral, although each is used to denote the other. The " distinction between tide waters and fresh, or between " public and private waters is not necessarily a material " consideration in determining questions relating to ripa- " rian rights, since riparian rights proper depend upon the " ownership of land contiguous to the water, *and are the* " *same whether the proprieter of such land owns the soil* " *under the water or not.*

This extract from the text of the work, seems to be well sustained by authorities referred to, and amongst others, the opinion of Lord Selborne in the case of *Lyon* v. *Fishmongers Co.*, 1 App. Cas., 662, L. R. 10, Ch. 679, from which a considerable quotation is made, immediately following the extract given.

At Section 149, the same author says: " The rights " actually exercised by the proprietors of land on the " shores of tide water are often dissimilar from those en- " joyed by proprietors above the flow of the tide, since " salt water is less available in the arts or for irrigation, " etc., than fresh. But a littoral proprietor, like a ripa- " rian proprietor, *has a right to the water frontage be-* " *longing by nature to his land*, although the only practi- " cal advantage of it may consist in the access thereby " afforded him to the water, for the purpose of using the " right of navigation. This right of access is his only, " and exists by virtue and in respect of his *riparian* " *property*. It is distinct from the public right of naviga- " tion, and an interruption of it is an encroachment upon

" a private right, *whether caused by a public nuisance or* " *authorized by the legislature.*"

In *Yates* v. *Milwaukee*, 10 Wall., 497, this court, speaking by Mr. Justice MILLER (p. 504), says: "But whether " the title of the owner of such lot extends beyond the " dry land or not, he is certainly entitled to the right of " a riparian owner, when land is bounded by a navigable " stream; and amongst those rights are access to the " navigable part of the river from the front of his lot, " the right to make a landing, wharf or pier for his own " use or for the use of the public, subject to such general " rules and regulations as the legislature may see proper " to impose for the protection of the rights of the public, " *whatever those may be.* This proposition has been decided " by this court in the cases of *Dutton* v. *Strong* and the " *Railroad Company* v. *Schurmier*, just cited. The " Supreme court of Wisconsin has gone further and " asserts the doctrine, that the title of the owner of such " a lot extends to the center of the stream, subject to the " easement of the public in its use for navigation, and that " he may construct docks or landing piers for goods or " passengers, taking care that vessels employed in navi- " gating the stream are not impeded in their passage, nor " prevented from the use of all parts of the stream which " are navigable.

(Reference is made to *Walker* v. *Shepardson*, 4 Wis., 486.)

" This riparian right is property, and is valuable, and " though it must be enjoyed in due subordination to the " right of the public, *it cannot be arbitrarily or capric-* " *iously destroyed or impaired;* it is a right of which, when " once vested, the owner can only be deprived *in accord-*

"*ance with established law*, and, if necessary that it be "taken for the public good, upon due compensation."

There is no act of legislation, either of the United States or of the State of Illinois, which abridges or fixes a limit to the general rights of the Illinois Centrail Railroad Company, as a riparian owner between the boundaries above indicated, *and the court is without jurisdiction to impose such a limitation.*

In *Delaplaine et al.* v. *C. & N. W. Ry. Co.*, 42 Wis., 214, the questions considered, related to the rights of a riparian owner, on the shore or margin of a small inland lake not more than three or four miles in extent in any direction. In the United States survey of the lands, bordering upon the lake, the shore line had been meandered. Delaplaine and his associate were owners of a lot or lots, of which the lake was a boundary. The railway company was proposing to build its railroad across an arm or bay of the lake, in front of the Delaplaine lots. The proceedings in court had this origin, and the Wisconsin court, after citing many authorities, at p. 226 says: "But "while the riparian proprietor only takes to the water "line, it by no means follows, nor are we willing to ad- "mit, that he can be deprived of his riparian rights with- "out compensation. *As proprietor of the adjoining land* "*and as connected with it*, he has the right of exclusive "access to and from the waters of the lake at that par- "ticular place; *he has the right to build piers and wharves* "*in front of his land out to navigable waters in aid of* "*navigation*, not interfering with the public use. *These* "*are private rights incident to the ownership of the shore* "*which he possesses, distinct from the rest of the public.* "All the facilities, which the location of his land, with "reference to the lake, affords, he has the right to enjoy

" for the purposes of gain or pleasure; and they often " give property thus situated its chief value. *It is evi-* " *dent from the nature of the case*, that these rights of " user and exclusion are connected with the land itself, " grow out of its location, and cannot be materially " abridged or destroyed without inflicting an injury upon " the owner, which the law should redress. * * * " In other words, according to the uniform doctrine of " the best authorities, *the foundation of riparian rights*, " EX VI TERMINI, *is the ownership of the bank or shore.* " *In such ownership they have their origin. They may* " *and do exist, though the fee in the bed of the river or* " *lake, be in the state. If the proprietor owns the bed of* " *the stream or lake, this may possibly give him some ad-* " *ditional right, but his riparian rights, strictly speaking,* " *do not depend on that fact.*"

In the same volume (42) of the Wisconsin reports are other cases to the same effect, viz.:

Deitrich v. *The N. W. U. Ry. Co.*, 248.
Boorman v. *Sunnuchs*, 233.
Olson v. *Merrill*, 203.

All these cases, upon questions here material, seem to coincide with the doctrine of the Delaplaine case. The astuteness of C. J. Ryan, which cannot be questioned by any man who had information of his wide-reaching capacities (even though he may have had knowledge of his narrow prejudices) is illustrated in his opinion in the Diedrich case, by his criticism upon the decisions of this court in the case of *Strong* v. *Dutton* and *Atlee* v. *Packet Company*, which may be disregarded. Whether he rightly appreciated the force of those decisions, and their direct application, may be a question of doubt. I prefer the plain language of this court, as an expression of the law, to any

criticism of it by even so able a commentator as C. J. Ryan is understood to have been. The interpretations of its own opinions must be ultimately left to the court pronouncing them, and it may be said, without offense, that it is unfortunate, that this court, in passing upon questions of general and public law, should feel itself obliged, by rules of courtesy, to follow the *meandering* lines of state decisions and give effect to the diverse rules of different states.

In *Dutton* v. *Strong*, 1 Black 25, the facts were, that Dutton and Hines, the owners of a lot or lots, bounded on the east by Lake Michigan, in the city of Racine, Wisconsin, had constructed a pier from the shore line of their premises out into the open waters of the lake, to a point where the waters of the lake were navigable in fact, *in a commercial sense.* A vessel, owned by Strong and Goodnow, was driven by stress of weather, up to this pier and was made fast to the timbers of the pier. The strain of the vessel loosened the timbers of the pier and threatened to destroy it, and, after ordering the vessel away and waiting long enough to determine that the order would not be obeyed, the owners of the pier cut the hawser and the vessel drifted against another pier, and to save it from total loss, it was scuttled and sunk. The owners of the vessel sued the owners of the pier for the damage to the vessel. The right to the ownership and control of the pier was one of the questions *directly* involved, and Mr. Justice Clifford in delivering the opinion of the court, (p. 31,) says:

"Bridge piers and landing places, as well as wharves "and permanent piers, are frequently constructed by the "riparian proprietor on the shore of navigable rivers, "bays and arms of the sea, as well as on the lakes; and

"when they conform to the regulations of the state and "do not extend below low-water mark, it has never been "held that they were a nuisance, unless it appeared that "they were an obstruction to the paramount right of nav- "igation. Whether a nuisance or not is a question of "fact; and where they are confined to the shore and no "positive law or regulation was violated in their erection, "the presumption is, that they are not an obstruction, and "he who alleges the contrary must prove it. Wharves, "quays, piers and landing places, for the loading and un- "loading of vessels, were constructed in the navigable "waters of the Atlantic states *by riparian proprietors*, at "a very early period in colonial times; and, in point of "fact, *the right to build such erections*, subject to the lim- "itations before mentioned, *has been claimed and exercised* "*by the owner of the adjacent land from the first settle-* "*ment of the country to the present time.* (Angel on "Tide Waters, 196.) * * * No reason is perceived "why the same general principle should not be applica- "ble to the lakes, although those waters are not affected "by the ebb and flow of the tide; and consequently the "terms, '*high and low water mark*,' are not strictly ap- "plicable. But the lakes are not navigable, in any "proper sense, at least in certain places, for a considera- "ble distance from the margin of the water. Whenever "the water of the shore, so to speak, is too shoal to be "navigable, *there is the same necessity* for such erections "as in the bays and arms of the sea; *and where that ne-* "*cessity exists*, it is difficult to see any reason for denying "to the adjacent owner, the right to supply it; but the "right must be understood as terminating when the ne- "cessity for such erections ordinarily ceases."

The case of *Atlee* v. *Packet Company*, 21 Wall., 389,

was a proceeding in admiralty. A steamboat belonging to the Packet Company had been wrecked, in the night time, upon a pier erected in the channel of the Mississippi river, of which the pilot had no knowledge, about three-fourths of a mile below the landing at the city of Fort Madison, Iowa. The pier was opposite land bordering upon the shore, owned by Atlee, but in no wise connected therewith, and had no use, nor was it intended to have any, in the navigation of the river. It was a permanent and independent structure in the navigable channel of the river, placed there by Atlee as a support for a boom to hold logs to be sawed at his mills. The pilot of the steamboat, although an old and experienced one, had not navigated that part of the river for fifteen months prior to the accident and, within that time, the pier had been built.

The United States District court of Iowa held that both parties were at fault, viz: Atlee for erecting the pier as he did, and the packet company for employing a pilot, ignorant of its existence, and divided the damages resulting from the collision. Upon appeal, the Circuit court held that Atlee was alone at fault, and awarded full damages against him. This court reversed the decree of the Circuit court, and sent the case back for entry of a decree upon the equitable admiralty doctrine of contribution between wrong-doers. The facts of the case carry it outside of the doctrine of the case of *Dutton* v. *Strong*. The opinion of the court, by Mr. Justice Miller, holds that the pier, as constructed by Atlee, was an unlawful structure; but it very clearly distinguishes between the case as presented by its facts, and the cases of *Yates* v. *Milwaukee*, *Dutton* v. *Strong*, and the *Railroad Co.* v. *Schurmier*, to which reference is made. One of the head-

notes of the opinion, which fairly represents the text in this respect, is as follows:

"2. Such a structure differs very materially from "wharves, piers and others of like character, made to "facilitate and aid navigation, and generally regulated by "city or town ordinances, or by statutes of the state or "other competent authority."

In the case of the *Railroad Company* v. *Schurmier*, 7 Wall., 272, the court, again speaking through Mr. Justice Clifford, and after referring to the particular circumstances of that case, the several acts of Congress relating to navigable waters, and the common law doctrine, that navigable waters were limited to the ebb and flow of the tide, at pages 288–9, says:

"Viewed in the light of these considerations, the court "does not hesitate to decide that Congress, in making a "distinction between streams navigable and those not "navigable, intended to provide that the common law "rules of riparian ownership should apply to lands bor-"dering on the latter, but that the title to lands border-"ing on navigable streams should stop at the stream, and "that streams should be deemed to be and remain public "highways.

"Although such riparian proprietors *are limited to the* "*stream*, still, they also have the same right to construct "suitable landings and wharves, for the convenience of "commerce and navigation, as is accorded to riparian pro-"prietors bordering on navigable waters affected by the "the ebb and flow of the tide." (Reference is made to *Dutton* v. *Strong*.)

In the case of *St. Louis* v. *Rutz*, 130 U. S. 226, there is a very extended discussion in the opinion of the court, based upon the special finding of facts by the United

States Circuit Court for the Southern District of Illinois, respecting the rights of riparian proprietors, involving, also, many technical discriminations in respect to the construction of boundary lines. It may be said that the principal questions in the case had immediate relation to the conditions and extent of *riparian ownership*, and the result of the opinion of the court upon these questions is, (p. 246), summarized as follows:

"It may be asked, pertinently, what has become of the "riparian rights of the plaintiff on the river" (Mississippi) "if his title to the land in dispute is not sustained? It "appears by the findings that the greater part of the so-"called Arsenal island, which is now embraced within the "boundaries of the land sought to be recovered by the "plaintiff, is located upon the site of the dry land, of surveys 149 to 156 as the same existed from 1850 to 1865, "and that the residue thereof, being about one-eighth of "the entire width of the island, is located upon the bed of "the Mississippi river as it then existed, and eastwardly "of the thread or middle line of the river; that between "1865 and 1873 the river front of the surveys was "washed away to the extent mentioned in finding 8, and "was further washed away thereafter until 1884, and "that such washing away did not take place slowly and "imperceptibly, but was rapid and perceptible in its progress, and the particulars are given in finding 9.

"*The plaintiff was a riparian proprietor on the river.* "If his title to the land in question is not sustained, he is "no longer such riparian proprietor, and is cut off from "access to the river. Among his rights, *as a riparian* "*owner*, are access to the navigable part of the river from "the front of his land, and the right to make a landing, "wharf or pier for his own use, or the use of the pub-

"lic. *Dutton* v. *Strong*, 1 Black, 23; *Railroad Co.* v. "*Schurmier*, 7 Wall., 272; *Yates* v. *Milwaukee*, 10 Wall., "497–504."

There is no propriety in an attempt to reconcile the *irreconcilable* conflict between the decisions of State courts, and, therefore, of this court, which tries to follow the *meandering* decisions of State courts, upon questions of property rights within their respective boundaries, as to the absolute title to land under waters *navigable in fact*, as distinguished from land under *tide waters*. The case of *Hardin* v. *Jordan*, 140 U. S., 371, does not give any relief in respect to this technical question. I say "*this technical question*," for, aside from the question of ownership of the bed of waters navigable in fact, the rights of the riparian proprietor, as such, and as defined by the courts, cover all the possible advantages of water frontage, and it is upon *these riparian rights, alone*, that the claims of the owners of the land abutting upon navigable waters have been sustained *and not upon their ownership of the bed of the waters, even where such ownership has been admitted.* This is true of all the Illinois cases, and there is no apparent reason why it should not be conceded, that a naked title to land under waters navigable in fact, was absolutely worthless to the owner of the shore, disconnected from his rights as a riparian proprietor. The waters above the land are public, except in a very limited sense. Unless he had some right, as against this public right, his ownership of the land under the water, would be absolutely worthless, and all these rights of available and valuable ownership are entirely independent of the ownership of the soil under the water, which can, in no case, interfere with public rights and easements.

In Gould on Waters, Sec. 155, the author, (speaking of the right of riparian owners, and more especially of access to navigable waters,) says: "This right of access "is not lost by the gradual formation of new soil upon "the margin of the water caused by the action of the "tides or current. Estates bordering upon navigable "waters often derive a great part of their value from "that circumstance; and the riparian owners, if deprived "of the benefit of that situation by *extraneous* additions, "would suffer hardships and injustice, even when they "obtained the full proportion of the land measured by the "surface.

"Land formed by *alluvion*, or the gradual and "imperceptible recession of the water, belongs to the "owner of the land to which the addition is made. "There is no distinction in this respect between soil "gained by accretions and that uncovered by reliction. "The change is imperceptible, when it is not discernible "in its progress, though the fact that there has been an "increase may be perceptible year by year, or at shorter "intervals.

"*Conversely*, land, gradually encroached upon by "navigable waters, *ceases to belong to the former owner.* "The external bounds of estates situated upon the shore "of the sea, or of navigable rivers, may thus gradually "shift, as the water recedes or encroaches; although the "right to the shore itself, of course, remains in the crown "or state. The law upon this subject is based upon the "maxim, *qui sentit onus debit sentire commodum*, since "the owner takes the chance of gradual loss as well as "gradual gain, and upon the impracticability of identify-"ing from day to day, the small additions or subtractions "caused by the action of the waters. The rule is the

"same when the old boundaries are not known and "when they can be ascertained.

"The doctrine as to alluvion *is equally applicable to* "*tide waters and non-tidal rivers and lakes*; to those "waters which do and those which do not overflow their "banks, and where dikes and other defenses are and "where they are not necessary to keep the water within "its proper limits, etc.

See also

2 Blackstone's Com., 261;
3 Kent's Com., 428;
3 Washburn on Real Property, 58;
Livingston v. *Co. of St. Clair*, 64 Ill., 56;
Co. of St. Clair v. *Livingston*, 23 Wall, 46–68.

The right to accretions and relictions are the necessary and natural consequence of riparian ownership. They are treated by text writers, and in the opinions of courts, as rights *incident and appurtenant* to ownership of the land bordering upon the water, and, thus considered, they are in harmony with the doctrines of the common law, that land does not pass as appurtenant to land, and with the reasonable proposition that, when land is sold with boundaries indicating a given number of acres, at a fixed and stipulated price per acre, as is the case with all government sales, the purchaser acquires only so much land as he pays for, except that the boundaries as given may be said to control the acreage, rather than the acreage the boundaries. However this may be, the proposition that the purchaser of ten acres of land, specifically bounded upon a natural and meandered body of water, acquires thereby, and by his deed or patent, title to 150 acres more, and, possibly, acres of indefinite extent under

water—land not included in his description, and in no way paid for, or attempted to be paid for by him, scarcely commends itself to a reasonable understanding; whilst the right of accretion and reliction, with its correlative liability to loss by the gradual encroachment of the waters upon the shore, are consistent with the boundaries of his purchase and the price which he has paid. So also is the right of such a purchaser to build out from his shore line into and through the shallow waters, docks, wharves, quays and piers, to waters which are navigable in fact, in his own interest and in the interest of the public; for under all the authorities, this is also a right, appurtenant to the land, which has been explicitly granted, and passes to and from him by deed of the specified land, by reason of its location and boundary, unless expressly reserved.

But, however this question of *technical* ownership of land under the waters of a lake, large or small, in which there is no visible current, may be ultimately settled, and whether the decisions of the Illinois courts, administering the law as to the title of real property within its boundaries, shall be followed by this court or not, the rights of the Illinois Central Railroad Company, *as a riparian owner*, viz: the owner of the land abutting upon Lake Michigan between the south pier of the Chicago river and Randolph street, and between Park row and 16th street, in the city of Chicago, connot be impeached, impaired, diminished or restricted by a judicial decree alone. The great lakes, of which Lake Michigan is one, are confessedly devoted to commercial uses, and whatever expansions of title may be adjudged to be applicable to small and currentless bodies of water, wholly within a particular state, upon which there is no commerce either in a national or international sense, these

lakes, with their connecting waters, form the boundary not only between states, but also between the United States and foreign nations. They are the highways of an interstate and international commerce, larger than that of any one Atlantic or Pacific city, and of many of them combined, and in the language of this court in the case of *Dutton* v. *Strong*, the principle of which has been many times affirmed, "no reason is perceived why the same "general principles (the principle applied to tide-waters), "should not be applicable to the lakes, although those "waters are not affected by the ebb and flow of the tide; "and, consequently, the terms 'high and low water-"mark' are not strictly applicable."

With the exception of the pier, at or near 13th street, which was constructed under the supervision and by authority of the proper officers of the United States, it does not appear, nor can it be claimed upon this record, that either the State of Illinois, or the United States, or even the municipal authorities of the City of Chicago, have attempted to regulate or limit the rights of the rail-railroad company *as a riparian owner*, between Park Row and 16th street, nor does it appear, nor can it be claimed, that the piers, slips, breakwaters, or other constructions, which it has placed or proposes to place in the shallow waters of the lake adjacent to its shore line, do, or can interfere, either with the navigation or commerce of the lake, or with any general plan indicated or devised by the United States for the improvement of the outer harbor of Chicago. *Neither the devising of such a plan nor the promulgation of it, is within the judicial power of the courts, either state or national.* That portion of the last paragraph of the decree (Rec., 225) *which attempts to enjoin the Illinois Central Railroad Company*

from "erecting structures in or filling in with earth, or "other materials, any portion of the bed of Lake Michigan, "as it now exists and as shown on the Morehouse map "east or in front of said fractional sections ten and fifteen "that is, east or in front of grounds now occupied and "used by it between Chicago river and the north line of "Randolph street extended easterly, or east or in front of "the grounds now occupied and used by it between the "north line of Randolph and the center line of 16th "street, each extended easterly, except that said company "may complete the slip or basin already commenced "immediately north of 16th street extended" etc., *is extra-judicial and without authority*, as to so much, at least, of the frontage of the lake as lies between the Chicago river and the north line of Randolph street extended and between Park Row and the center line of 16th street, and is therefore erroneous and should be reversed.

The fixing of harbor lines and shore improvements is not a judicial function. It belongs to the legislative and administrative department of the government, and the portion of the decree above referred to, or rather, perhaps, the scope of it, in effect, restrains the railroad company, *as a riparian owner*, from agreeing with those departments of the government, whether national, state or municipal, for further harbor improvements in its own interest or the interest of the public, and from erecting any structures in front of its own property, in pursuance of such agreement, if such agreement should be made. It is respectfully submitted, that in these respects the decree transcends the jurisdiction and authority of the court.

III.

The making, certification, acknowledgment and recording of the plats of fractional sections ten (10) and fifteen (15) respectively, which must now be familiar to and fully understood by the court, were the acts of the United States in the one case and of the State of Illinois in the other, in their corporate capacity through properly appointed agencies, AS PROPRIETORS OF LAND *within the jurisdiction and boundaries of the State of Illinois. They were steps preliminary to the sale of real estate, and the sales of lots were more than forty years ago fully completed by the proprietors in accordance with said plats and, in view of the law of Illinois, controlling at that time, as to the legal effect of such plats. The consequences of such a plat and its record as to the title of the streets, alleys and public grounds, were and are controlled by the statutes of Illinois. The City of Chicago by virtue of the plats, took the title to the streets, etc., as an agency of the state for local government. It acquired nothing distinctively its own in the sense of private ownership. It represented a mere naked legal title, held in trust for the public, with only such authority over the* RES *as was embraced within its delegated powers for purposes of local government. Every act of the city within those powers* ACTUALLY ACCOMPLISHED, *must be respected. Every power of the agency unexecuted is subject to revocation either expressly or by implication.*

In 1833 the General Assembly of Illinois passed an act entitled, "An act providing for the recording of town "plats." Approved and in force February 27th of that

year. That act with immaterial modifications has been the law of Illinois ever since. It is shown as originally passed on page 599 of the revised laws of Illinois of 1833, substantially reproduced in sections 17 to 27 of the revision of 1845, under the title, "*Corporations*," and it is again reproduced in the revised statutes of Illinois by Hurd, as chapter 109, page 77, of the revision of 1874.

The statute as originally passed, and subsequently continued, was and has been an effort, successful in itself and generally acquiesced in, to protect all private and public rights, which could reasonably grow out of a subdivision of lands, generally defined by government surveys, into smaller parts, and to preserve a reliable record of all such subdivisions for the protection of the rights of the public, as well as more immediately, perhaps, the rights of individuals purchasing land in accordance with such subdivisions. The reason of a law is of the essence of its construction.

The fifth section of the act of 1833 was as follows: "The plat or map when made out and certified, acknowl- "edged and recorded as required by this act, every do- "nation or grant to the public or any individual or indi- "viduals, religious society or societies, or to any corpora- "tion or bodies politic, marked or noted as such on said "plat or map, shall be deemed in law and in equity a "sufficient conveyance to vest the fee-simple of all such "parcel or parcels of land as are therein expressed, and "shall be considered to all intents and purposes as a gen- "eral warranty against such owner or owners, their heirs "and representatives, to the said donee or donees, grantee "or grantees for his, her or their use, for the uses and "purposes therein named, expressed or intended, and no "other use or purpose whatever, and the land intended

"to be for streets, alleys, ways, commons or other public "uses in any town or city shall be held in the corporate "name thereof, in trust for the uses and purposes set "forth and expressed, or intended."

It has not, in the progress of this litigation, been contended, that the plats or maps of the subdivisions of fractional sections ten and fifteen, were not made, executed, certified and recorded in compliance with the law of 1833, by the United States, and the State of Illinois represented, respectively by Mathew Burchard as agent of the war department of the United States and the Canal Commissioners, as the representative of the State of Illinois.

The plat of "Fractional Section Fifteen Addition to "Chicago" was made and recorded in 1836. The plat of the subdivision of fractional section ten, by the authority of the United States, was made and recorded in 1839. The results of the Illinois law of 1833 apply to both of these subdivisions. A few authorities of Illinois and other courts may, perhaps, be appropriately referred to, upon the understanding of counsel, at least, that the principles underlying the subdivisions in those cases, have not been disturbed by legislation or otherwise. I cannot preface the points decided by a full statement of the facts in each case. The court must trust me for the statement, that the questions decided were questions involved, and therefore properly considered by the courts.

Amongst the earliest cases in Illinois relating to the title of streets, etc., in cities and incorporated towns, are the cases of

Canal Trustees v. *Haven et al.*, 11 Ill., 554.
Hunter v. *Middleton*, 13 Ill., 50.

These cases in their conclusions have been consistently followed in numerous other decisions of the Illinois Supreme court, since made, and may be said to have fixed the law of the state, and given a construction to and declared the effect of, the statute relating to town plats above referred to.

In the earlier case, the first two divisions of the syllabus are as follows:

"1. A proprietor of land, who lays out the same, "under the statute, into town or city lots, vests the legal "title to the land embraced by streets, in the corporation "of the town or city for the use and benefit of the public. "It is a solemn dedication of the ground to the corporation, "to be held in trust for the uses and purposes of the "public.

"2. The recording of the plat passes the fee to the "corporation. If the town has not a corporate existence "the fee remains in abeyance, subject to vest in the cor- "poration the moment it is created."

The principles thus stated, and which the text of the opinion fully sustains, are recognized and enforced not only in the case of *Hunter* v. *Middleton*, but also in

Chicago v. *Laflin*, 49 Ill., 172.
Chicago v. *M'Ginn*, 51 Ill., 266.
Braxon v. *Bussler*, 64 Ill., 488.
Ind. B. &. W. R. R. Co. v. *Hartley*, 67 Ill., 439.
Gebhart v. *Reeves*, 75 Ill., 301.
Quincy v. *Jones*, 76 Ill., 231.
Helm v. *Webster*, 85 Ill., 116.
Chicago v. *Rumsey*, 87 Ill., 348.
Bristol v. *Carroll Co.*, 95 Ill., 84.

Druley v. *Adam*, 102 Ill., 177.
Brooklyn v. *Smith*, 104 Ill., 429.
Harris v. *Board of Supervisors*, 105 Ill., 445.
Matthiessen v. *City of Peoria*, 117 Ill., 410.
Hamilton et al. v. *C., B. & Q. R. R. Co.*, 124 Ill., 235.

I wish to call the attention of the court especially to only two or three of these cases above cited, which seem to be particularly in point.

The case of *Chicago* v. *Rumsey*, 87 Ill., 348, is a very instructive one upon the question under consideration. It involved the ownership and right of control over a street in the original town of Chicago, which was a part of a subdivision of land made by the commissioners of the Illinois and Michigan canal, and resting upon the same authority of law under which the commissioners of the canal made and recorded the plat of fractional section 15, addition to Chicago. Both parcels of land were canal lands, and were granted to the State of Illinois by the United States in aid of the construction of the canal. The opinion of the court, which is by Mr. Justice SCHOLFIELD, fairly presents the several acts of legislation which authorized the canal commissioners to subdivide, plat and dispose of the canal lands, all of which are equally as applicable to fractional section 15 as they were to the tract upon which the original town was laid out; for although the original town was laid out, as appears in the case, before the law of 1833, yet the plat was not certified and recorded until 1837, and after some of the lots in the subdivision had been sold.

Rumsey was the owner of a lot or lots abutting

on LaSalle street, in the original town, when the city of Chicago authorized and constructed a tunnel under the Chicago river, on the line of LaSalle street. Proper approaches to this tunnel made it necessary to excavate in LaSalle street on both sides of the river, and this excavation in the center of the street, about twenty feet in width, and opposite Rumsey's property, about fifteen feet in depth, necessitated a contraction of the side-walk in order that a reasonable passage-way at original surface grade, should be maintained on either side of the excavation. Rumsey claimed that his property abutting on the street was damaged by this action of the city authorities, and to recover these damages was the purpose of the action. He recovered judgment according to his claim in the lower court. That judgment was reversed in the Supreme court, and the case ended there.

The opinion in the Rumsey case (p. 353), says:

"It does not seem to be controverted, that this plat "(the plat of the original town) is evidence of all that "it shows upon its face—that is, the location, size and "numbers of the lots and blocks. But the point is made, "that not being acknowledged in conformity with the "statute of 1833, it does not convey a fee simple title in "the streets to the town, as it is held the acknowledg-"ment of plats in conformity with the statute does. "*Trustees* v. *Haven*, 11 Ill., 554; *Hunter* v. *Middleton*, "13 *id.*, 50; *Manley* v. *Gibson*, *id.*, 308; *Leach* v. "*Waugh*, 24 *id.*, 228.

"Had the land, when the town was laid out, belonged "to a party other than the state; or, possibly, had the "legal title been conveyed to a trustee or trustees for the "use of the state, the point would have been well taken. "But, as we have seen, the land, where these lots were

" laid off, belonged to the state. The legal title was not " held in the name of a trustee, but by the state; and the " lots were conveyed by patent issuing from the chief " executive officer of the state—in all material respects " similar to patents conveying lands from the general " government.

" The statute of 1833, (Rev. Stat. of 1833, p. 599), " embraces almost every conceivable authority, other " than the state, by which a town or addition thereto can " be laid out, and enjoins by severe penalties, conformity " with its provisions. But the state is not included within " its provisions, *and there is no need that it should be.* " Being sovereign, and capable of acting in that respect " only through its law-making power, in determining to " lay out a town, or an addition thereto, the law by which " it is caused to be done must necessarily prescribe what " shall constitute such laying out.

" But the statute of 1833 has one very important bearing " upon the question. It shows that it was the policy of " the state to so vest the fee of streets in cities, towns, " etc., *that it should be under the paramount control of the* " *legislature, for the public use, divested of all claims of* " *private ownership.* This being the declared policy of " the state, the presumption would follow, that no discrimi- " nation in this regard should exist between cities, towns, " etc., laid out by the state and those lai l out by other " proprietors—and it would require clear and satisfactory " proof, that the state intended to vest a *private* owner- " ship in the soil under the streets in the cities and towns " laid out by it, to induce in us the belief, that it was ac- " tually designed to acccomplish that result. A general " policy once established, it devolves upon those claiming " exceptions to clearly show their existence."

Every word of this and more, which follows, attaches with equal force to the subdivision of fractional section 15, which includes the land here involved, between the center line of Madison street and the center line of 12th street, which is about 240 feet south of Park Row, as shown upon the maps and prints contained in the record.

But the opinion farther on (p. 355) proceeds: "We "do not regard it of any practical importance, whether it "is more technically accurate to say the fee of this street "is in the state or in the city. If it shall be said to be in "the corporation, there can be no pretense for saying "that it is in it otherwise than *as an agency—a mere crea-* "*ture of the state—existing only by the authority of the* "*legislature*, and, at all times, under its paramount "supervision and control, and if it shall be said to be in "the state, it can only be said to be there for the purpose "of holding it for a street of the city, and in either case, "the sole purpose and end to be attained is precisely the "same—the holding it for the uses of a street of the city "for the benefit of the public—not the citizens of the city "alone, but the entire public, *of which the legislature is* "*the representative.*"

It is not necessary to extend the quotation, although it might be done without prejudice to the conclusion which inevitably results from the part quoted, that the town and city of Chicago is a mere agency of the state government, for local purposes, as all municipal corporations in fact are and should be considered. They are political organizations, intended to be in aid of the general legislative and administrative powers of the state. In that capacity, they take authority and rights, as an agency of the state merely, in respect to those matters which are

of public concern. This court will not misunderstand me. I do not mean to say, that a municipal corporation may not acquire property, hold, own and dispose of it, as a private owner. What I mean to say is, that whatever it takes, in its public and political character, it takes as an agency of the state and for public uses, *all of which are subject to legislative control by the state, and that as to such rights*, it can assert no individual and personal ownership as against the legislation of the state. The Rumsey case is a demonstration of this, and fixes a rule of decision for the property interests here involved, which, I assume, this court will respect.

In the case of *Matthiessen & Hegeler Zinc Co.* v. *The City of La Salle*, (otherwise designated as *Zinc Co.* v. *La Salle*), 117 Ill., 411, many, if not all the decisions of the Illinois courts bearing upon the question, and many others, were carefully reviewed and considered, and the opinion was prepared by the same judge who wrote in *City of Chicago* v. *Rumsey*, and the rule of decision, recognized and enforced in *Canal Trustees* v. *Haven*, 11 Ill., 554, and subsequently, including the Rumsey case, was adhered to and sustained.

The case presented was this: The Zinc company, as owner of lots in La Salle, abutting on either side of a street, filed a bill to enjoin the city and other persons from interfering by suits or otherwise with a right, which it claimed as such owner, to run tunnels and take out coal under the street separating its lots. The injunction was awarded by the Circuit court as prayed for. The Appellate court reversed the decree of the Circuit court—and the Supreme court affirmed the decision of the Appellate court.

One item of the syllabus of the case is all that need be quoted. It is as follows:

"2. And when land is laid out and platted by the state, "holding the legal title, the title or fee in the state "will vest in the town or village when incorporated, the "same as if the land had been laid out by a private own- "er. The corporation, in either case, holds the title "for the use of the public, *as an agency of the* "*state.*"

I do not care to quote from other authorities here. The same rule or doctrine is supported in the cases of

Harris v. *Board of Supervisors*, 105 Ill., 445.

Bailey v. *The Mayor, etc.*, 3 Hill, 531, 539.

Hunsaker v. *Borden*, 5 Cal., 288.

The Hartford Bridge Co. v. *E. Hartford*, 10 How., 511–534–6.

Van Hoffman v. *City of Quincy*, 4 Wall., 335–354–5.

The result of these authorities, and the numerous others referred to in the cases cited, would seem to be, and it is so insisted, that, in Illinois, at least, the title to streets and public grounds, appearing upon the plat or map of a subdivision of land, constituting the area of a municipal government, or an addition thereto, executed, acknowledged and recorded in substantial compliance with the law of the state in that behalf, operates as a conveyance in fee to the municipality designated on the plat, of the title to the streets and public grounds represented on the face of the plat, *in trust* for the public

use, and as an agency of the state for political or governmental purposes. That, in such cases, and in respect to such grounds, the municipality acquires no personal or private ownership, but only a right of supervision in accordance with the powers granted to it, as an agency of the state, the absolute control over and right of disposition of, the public interest remaining in the state to be exercised through its legislature as the representative of the public.

The cases are further pertinent and instructive in holding, that it is immaterial as to this result, who the proprietor, making the subdivision, or causing the plat to be prepared, executed and recorded, may be, or by what legitimate agency these several acts may be performed.

The *fourth* proposition of the brief need not be repeated. It is simply a corollary—a deduction from the premises already insisted upon; and, to this may be added, that, inasmuch as the municipality takes only a naked legal title as trustee for the public, and, as such trustee, is only an agency of the state, the powers of the municipality over the subject-matter of its agency are continuously subject to state control, through legislation of the state, and the municipality can not be heard to assert any right as against such legislation. *The right and authority of a mere agent cannot be asserted against the right and authority of his principal.*

The city of Chicago and other cities and municipalities of the State of Illinois, as to every power which they possess, as well as to corporate existence itself, depend upon the legislation of the state. The special charters, and the general law under which they may be respectively organized, in every particular and branch of them, are subject to modification and repeal by appro-

priate acts of state legislation, for that purpose passed by the general assembly. The power of state control, which has never been questioned, imports a right in the state to revoke whatever of control it may have granted to municipal corporations. That the state has not specifically exercised this authority, does not affect the *fundamental* principle. Whatever the state, by its proper representatives, may do in curtailment, either express or implied, of the authority of its agency, must be respected by the courts. The grant of the state must suspend the right of the agency, both as to control and title hostilely asserted.

In the case of the *People, etc.* v. *St. Louis et al.*, 5th Gilman, 351, the proposed work was intended to close effectually the navigable channel of the Mississippi river between the Illinois shore and Bloody Island. The owners of the Illinois shore had given their consent to the work, but the opinion of the court places the injunction upon the ground of *absolute obstruction of the navigability of the east channel of the river*, and this the riparian owners could not authorize, because they would have no right to do the same thing themselves. The proposed work was an absolute closing of a navigable channel.

Assuming, because it is conceded as well established, that the state, upon its organization and admission into the Union, became the owner of the soil under the waters of Lake Michigan, so far as within its boundaries, with full right and authority of disposition over the same, what is the legal status of the Illinois Central Railroad Company with respect to its right of way from Randloph street south to 12th street? The eastern portion of block 23 may possibly stand in a different relation to the question,

as thus presented, from that of the remainder of the property fronting on the lake within the limits named; but if it does occupy such special relation, the difference is one of ownership and of *private* ownership, which is not involved in this litigation. Something of block 23 has undoubtedly been washed away since the plat of fractional section 15 was made and recorded. The whole addition, however, including block 23, was sold by the state more than fifty years ago, and if the purchasers or their grantees have any controversy with the Illinois Central Railroad Company, as riparian owner or otherwise, that controversy is not involved in, and cannot be settled by, this proceeding. The rights of the State of Illinois and of the city of Chicago, as opposed to the claims of the railroad company, are all that is now involved. It is made to appear, and must be admitted upon the face of the present record, that between Park Row and the north line of Randolph street the right of way of the railroad company was located in the open waters of Lake Michigan of a width of 200 feet, with the consent of the proper authorities of the city of Chicago. The consent of the city, *if it had authority* (AND IF IT WAS THE OWNER, AUTHORITY MIGHT BE INFERRED), extended this right to 300 feet in width. This was in the year 1852. The company immediately took possession of this right of way, 200 feet wide, built its railroad upon it, and constructed the breakwater on the outer edge of it, as required by the ordinance of June, 1852, has ever since maintained that breakwater, and occupied the right of way for its tracks, etc. It is also made to appear, that the triangles south of the north line of Randolph street and bounded by that line on the north, were, when taken possession of by the railroad company, in the

open waters of the lake; that the possession thus taken was, as to one of said triangles, in 1855, and as to the other, in 1856, the city of Chicago, by ordinance, consenting in each case; and that the possession and appropriation of said triangles, as well as other lands under wator, were for purposes connected with the operation of the company's road, and that they have been in the occupancy and use of the company for railroad purposes, without intermission or obstruction, from the time they were respectively taken possession of.

I am not disposed to place much reliance upon the ordinances of 1855 and 1856 relating to those triangles, for the reason that I do not believe, they were necessary to any right or claim of right on the part of the Illinois Central Railroad Company. After the city had consented to the location of the line of the railroad, it was not necessary to procure its consent to the laying down and operation of every side-track, switch or turn-out, auxiliary to the operation of the main line, to the location of which municipal consent had already been given. Nevertheless the ordinances are in the case, and the court will give to them such effect as they deserve.

There can be no doubt that the railroad company, its right of way being rightfully located, and its main tracks constructed upon that location, would have the right and the power to acquire the necessary facilities to make that location available for the transaction of the business of its organization, and which must have been in the contemplation of all the parties interested in that location. The authority to acquire such facilities, as well as its original right of way, can hardly be doubted, under the specific grant to that effect inserted in its charter. The depot grounds of the company were located on the lake

shore north of Randolph street. The location of the right of way into the city was made and consented to by the municipal authorities with reference to that location. The location of terminal or depot grounds at a station like Chicago on a trunk line railroad like the Illinois Central, involves more than the mere running of its main tracks into the depot buildings. Many acres of ground are as necessary to the operation of the road in such relations, as the narrow strip over which its trains are run in the open country. Railroad companies not only carry their passengers and freight *to the place of destination*, but must also, at their peril, furnish reasonable facilities, certainly safe ones, for debarkation and delivery. To run railroad trains requires but a narrow space; to take care of them and their contents at the place of general delivery, is an essentially different matter, and yet provision for it must be made in order that the purposes of the railroad may be accomplished. This is the statement of a common intelligence and a general understanding.

It cannot be doubted that the Illinois Central Railroad Company had the right and authority to locate its way and depot grounds at Chicago, in the manner and at the places it did. Lapse of time, merely, does not divest vested rights; it may strengthen titles when associated with other facts, but it never weakens them. What the Illinois Central Railroad Company had the right to acquire and did acquire, in 1852, in 1855 and in 1856, and subsubsently it has the right to hold in 1892, if none of its rights have been forfeited. Having the right to acquire under its charter the right of way and its depot grounds as located, it had also the right, under its charter, to acquire access to these depot grounds from the right of way, in order to render that right of way available for the purposes of its organiza-

tion. It is not too much to say, that the relations of the depot grounds with respect to the right of way, necessitated the taking of the two small triangular pieces of land referred to—the first and smaller one on the west, as a means of ingress to and egress from its passenger station, and the other on the east as a means of transferring freight cars from its main tracks to freight houses and freight yards necessarily located on the east side of its passenger house and right of way. These triangles and other grounds were and are as essential to the complete operation of the road of the company as is the right of way by which they are approached, and they certainly fall within the description of property contained in the third section of the charter, which the company is authorized to acquire, and which, if belonging to the state, was granted by the state, for the purposes for which the company was organized.

The information admits, that at the time of the appropriation of these triangles they were the property of the state, and this being so, the grant from the state contained in the charter. took effect upon them from the time of their appropriation and use, just as effectively and from the force of the very same language, as it did in respect to the right of way. But there is an intimation in the information that the right of way between Park Row and Randolph street and the triangles above referred to, were not always submerged lands, and at some time in the indefinite past, covering at least the entire period between the years 1821 and 1852, was solid ground, and fractional sections 10 and 15 included these triangles and the right of way, and that consequences favorable to the state or the city of Chicago, may result from that fact, if a fact it should appear to be. The intimation is, that there is a

sort of indefinite right in somebody to follow after the land once existing but which has been washed away and lost, and to recover it, and that the title to what once was, never can be lost, so long as the location where the property once was can be identified. Therefore, if the shore of Lake Michigan was ever beyond the line of the Illinois Central Railroad Company's location in front of fractional section 15, etc., that location and the incidents of it cannot have the effect now claimed for them, because the location of the right of way and of the triangles was once solid ground. I am disposed to treat the suggestion seriously, because it would seem to be the last one upon which can be suspended the claims of the information relating to the right of way, the triangles and other grounds covered by the information.

Neither the people of the State of Illinois nor the city of Chicago are in a condition to make the claims above referred to, even if, under ordinary conditions of private shore ownership, such a claim would be admissible. This statement is made independently of the effect of the Lake Front act of 1869, hereafter to be considered. Individual and private rights in this connection, whatever they may be, are not involved. It is simply the public, represented by the state, and the state as represented and controlled by its legislative acts, whose rights are in controversy. *The city of Chicago is only an agency of the state in respect to the matters in question.*

The clause of the charter of the Illinois Central Railroad Company, which required the consent of the common council of the city, to the location of the right of way of the company within its limits, is evidence of this. It was a responsibility placed by the state upon its agency. If the requirement had not been made by the charter, or

by some special power otherwise delegated to the corporate authorities of the city, and the power of specific location had been given by the charter to the company, no consent of the city authorities would have been necessary, and could not have been insisted upon, unless the location involved beneficial ownership by the municipality as distinguished from ownership or title, as a public agency. What the state granted absolutely, the agency of the state cannot complain of. Whatever ordinances the agency may adopt, or whatever its opinion as an agency may be, respecting the rights of the state, must, in order to be valid, harmonize with the purpose of the state as declared by its legislation, where public interests, and no private rights of the agency, are involved. This proposition is illustrated in the cases of

Keomels v. *R. R. Co.*, 27 La. An., 442.
Werges v. *R. R. Co.*, 38 La. An., 641.
Hill v. *R. R. Co.*, 38 La. An., 599.

In 1827, fractional section 15, with other lands, was granted by the United States to the State of Illinois, to aid the state in the construction and opening of the Illinois and Michigan Canal. The state took the title of the land in trust for this purpose, but with full and absolute power of sale and disposition. When the land was sold, the trust did not follow it into the hands of the purchaser, but attached simply to the purchase money in the hands of the state, for the proper application of which the faith and credit of the state became pledged. Every foot of fractional section 15 was laid out into "Fractional Section 15, Addition to Chicago," by authority of the state, and every foot of it was sold by the state and paid for to the state, through its proper officers. The state, *as a private owner*, parted with all its title in the whole fractional sec-

tion. The lots in the addition were sold to and paid for by individuals. The making and recording of the plat of that addition passed the title to the streets and public grounds to the municipal corporation of Chicago, not beneficially, but simply in trust for the uses of the public, according to their designations on the face of the plat.

Ordinarily the original proprietor, making a plat and dedication, by reason of his supposed right of reversion in the streets and public places designated on the plat, in case of abandonment, would have the right to have the dedication preserved as made by him, and would necessarily be consulted and must give consent to the change of use. But in the case of fractional section 15, the state was the dedicator, and reversioner, and, in this character, would be involved in any change of use made by its authority and, by its grant, would be estopped from claiming anything in violation of the grant, especially when the grant had been accepted and acted upon. This is the situation in respect to property rights in and in front of fractional section 15, between the state and the city of Chicago on the one side and the Illinois Central Railroad Company on the other. When the plat of fractional section 15 was made and recorded, the state owned the land and the soil under water in front of the land. It held the title to both in its sovereign and corporate capacity, as a state. Whatever had been subtracted from or added to its ownership by the operation of causes at work to diminish the one, had necessarily added to the other class of ownership, the ownership being complete as to both, and no attempt was made by the state to readjust the encroachment of the one estate upon the other. It is immaterial in this view of the situation, whether the plat of fractional section 15 addition to Chicago was a

statutory plat, properly made, executed and recorded, as required by the law of 1833, or not. If it were such a statutory plat, the technical title to the streets and public grounds, noted on the plat, vested in the municipality of Chicago. If it were not such a plat, having the legal effect which the law gives to such a plat, then the title to the streets and public grounds remained in the State of Illinois, in trust for the public use, and in either case, the whole public interest remained in the state, or its agency, subject to such disposition as the state might choose to make of it through its legislative department.

IV.

But it is intimated in the information, and has been insisted, that there is a further distinction to be made in respect to fractional section 15, because it was a part of the canal lands, granted by the United States to the State of Illinois, to aid in the construction of the Illinois and Michigan Canal, and it would seem to be claimed, that the law of 1833, governing town plats and defining their effect, should not apply to this particular tract or parcel of land, although admitted to be made, recorded, etc., in pursuance of the statute.

Whatever of plausibility there may seem to be in this claim, must be in appearance only, and even that is disposed of by the case of *The City* v. *Rumsey*, already referred to. The state, as a landed proprietor, must be bound by its own general laws when it acts under them. This proposition seems to be reasonable, and probably will not be denied. When the plat of fractional section 15 addition was made and recorded, the land belonged to the state, and was subject to its control and disposition.

The canal commissioners were merely officers and agents of the state, and were authorized as such by law to subdivide, sell and convey the canal lands. The special acts which cover this authority are the acts of January 9, 1836, and March 2, 1837, which, in broad terms, authorize the canal commissioners to subdivide and sell such portion of the canal lands as were suitable for town sites or additions thereto.

But, it has been said, the strip of ground east of the west line of Michigan avenue and north of block 23 has never been sold, and that it is still canal land, held by somebody for some purpose connected with the canal, not certainly for its construction, for that was completed in 1848.

Again, it is said, and it so appears, that the canal, although completed long ago, and is now and for many years past has been, not only owned by but is in the possession of the state, has not been self-sustaining, and that appropriations have been made from time to time out of the state treasury for its maintenance and repair. Nobody is disappointed at this result. The state bankrupted itself fifty years ago in an effort to maintain what was called a "state policy," of public improvements, and because it had reduced itself to beggary, it was compelled in 1843 to place the canal enterprise in the hands of private parties, as trustees, in order that it might not partake of the general failure and ruin. Few enterprises of a business character, undertaken in this country by public authorities, have ever been managed with success or business judgment. The genius of politicians does not run in such lines. Private enterprise would construct and put in condition for successful operation, public improvements around and across the state in all directions,

in less time and at less expense, than the state would require to construct and put in operation a single line across the state at its narrowest point. The failures of public authorities in this respect have been so frequent and conspicuous, that the recital of a particular one calls but for a stereotyped comment, the truth of which is never questioned.

The canal scheme may have proved a business failure for the state, but if so, that is no reason why the state should violate its own laws or be listened to with favor, when attempting to repudiate its own acts and contracts.

It is admitted, that, following the acts of 1843 and 1845, the state conveyed to the persons whose appointment was therein provided for, as trustees, the canal itself, with the right to manage it, collect tolls, etc., also, all unsold canal lands, with the right to sell and convey the same, under certain obligations to complete the canal, and upon the further trust that when the canal was finished and the construction debts paid, the canal and all other property pertaining thereto should be reconveyed to the state. All this was accomplished under the management of the trustees, and in the year 1871 the trustees reconveyed the entire remaining canal property to the state, and released to the state its title and control of the canal itself, and the accounts of the trustees were closed. None of the trustees, so far as appears, ever thought or suspected, that they held anything in fractional section 15 for sale. Certainly they conveyed nothing there, under their authority to sell the canal lands, and, whatever they took in fractional section fifteen under the conveyance to them as trustees, if anything, was restored to the state twenty years ago. In this view of the situation a simple illustration is admissible. It would seem to cover the condi-

tions and answer the pretensions of the state now under consideration.

A owns property, has contracts in process of execution, and owes debts. His personal credit is exhausted, and his ability is not equal to providing for his pressing emergencies. He, therefore, transfers everything, including his contracts, to B, as his trustee, who undertakes to finish his contracts, pay his debts, using his property so far as necessary for these purposes, and restore to him everything that remains when the purposes of the trust are completed. Before the trust is completed, A sells and conveys a lot of land which was included in the trust, and which the trustee never had occasion to use and never did use, but which was released to A upon final settlement between himself and his trustee. Who owns the property which had thus been conveyed? It could make no difference in such a case if A, after the assignment in trust, had been able to furnish outside of the trust property all the means, or a portion of them, to pay his debts and complete his contracts.

When these things were accomplished the trust was executed and the property embraced in it and undisposed of by the trustee, stands as though it never had been affected by the trust. The conveyance was a mortgage or pledge, which perhaps would be a simpler illustration The reversion of the property is all the time in the mortgagor or pledgor or his grantee, and to the extent that it is not converted by the mortgagee or pledgee when the debt is paid or the obligation performed, the acts of the mortgagor or pledgor in disposing of it are effectual certainly against him. The act of disposing of the property would be valid, subject to the lien, whilst the lien was pending, and would be effectual for all purposes

contemplated in it upon the removal or release of the lien.

It is not to be presumed (for the information does not contemplate it), that the court will indulge in any conjectures as to whether the canal lands or the proceeds thereof did or did not construct and complete the canal. It may be assumed that any investigation of that sort would not strengthen the case of the people. The lands were donated, "*for the purpose of aiding the said state in opening a canal to unite the waters of the Illinois river with those of Lake Michigan.*" (See Act of Congress March 2, 1827.)

That they did *no more than aid* the state in the work contemplated in the Act of Congress, which was undertaken and accomplished by the state, must be admitted; but whether this be true or not, the title to the lands was granted to the state for that purpose, with full power of sale and conveyance, and there was no provision for reverter to the United States, except upon the failure of the state to "open the canal," and not even then except as to the lands not sold. Whatever remained of the donation, after the completion of the canal and its opening, was the property of the state absolutely. There was no provision in the Act of Congress for a *reverter* of a surplus, even if there should be a surplus, nor was there any provision that such surplus should be applied in any way for the maintenance and repair of the canal after its construction. For this the faith of the state was pledged as between the state and the United States, and that security the United States accepted. It would be strange, indeed, if the state could set up its inability to redeem its pledge as against its own grant of a part of the donated land. But no such plea is

urged on behalf of the state. It does not profess any inability to maintain the canal and keep it in readiness for use by the United States, as specified in the act of March 2, 1827. The claim of the state rather is, that it has been compelled to pay money in the performance of its obligation, and because of this, it ought to be at liberty to disregard what it has done, or, that what it has in fact done, should be interpreted as though it never had been done. It says it never sold or conveyed anything in fractional section 15 north of Block 23, East of the west line of Michigan avenue, either above the water or in the water, and if it did, it had no right to make the grant, because it had mortgaged all that territory, at the same time admitting, that the mortgage has been released without execution of it against the particular property involved. This cannot be done as between individuals. It cannot be done by the state.

V.

The making and recording of the plats of fractional section 15 addition to Chicago, and of Fort Dearborn Addition to Chicago, and the sale of all the lots in those additions in accordance with those plats, divested the former owners, although they were the state in one case and the United States in the other case, of all their right, title and interest in said additions, as private owners, including the streets and public grounds, and the jurisdiction of the United States over the land comprising Fort Dearborn addition, was by the plat and the sale of the lots in pursuance of it, absolutely extinguished. In making and recording these plats the state and the United States were acting as private owners and subject to the law to the same extent that a citizen would be.

There is a broad distinction between jurisdiction in a political sense and ownership. A state may part with its title to land, or water, or land under water, without losing anything of its political jurisdiction over the premises conveyed.

The cases already cited have a general bearing upon this proposition, and to them may be added:

Rowan's Exec. v. *Portland*, 8 B. Monroe, 232.

Livingston v. *Mayor N. Y.*, 8 Wend., 106.

Wyman v. *Mayor N. Y.*, 11 Wend., 487.

A few cases having a more direct application may properly be referred to.

In *City of Dubuque* v. *Maloney*, 9 Withrow, Ia., 450, the case presented to the Supreme court of Iowa involved the effect of a town plat made and recorded by authority of the general government covering public lands, which were sold in pursuance of the plat thus made. The plat was apparently in the usual form of subdividing land into blocks, lots, streets and public squares, and at page 455 the court uses this language: "By laying off the land "on which the city of Dubuque is situated into lots, streets, "avenues, public squares and outlots, as represented on "the plat returned to the general land office, and by the "sale of the lots to the occupants thereof and to other "purchasers, the streets of the town of Dubuque were "dedicated to the public use in such manner, that the gen- "eral government, as the proprietor, was forever con- "cluded from exercising any authority or setting up any "title to the same.

"If the owner of land lays out a town and exhibits "a plan thereof, in which are represented various plats of

"spare and vacant ground, such as streets, alleys, squares, "quays, etc., and the lots are sold with reference to the "plan, the purchasers of the lots acquire, as appurtenant "to the same, every easement, privilege and advantage "which the plan represents as belonging to them. The "sale and conveyance imply a grant or covenant to the "purchasers that the streets and other public places indi- "cated as such upon the plan, shall be forever open to "the use of the public, free from all claims or interference "of the proprietor inconsistent with such use."

It would seem from this case, that the law of Iowa as respects the title to streets and public grounds in incorporated cities, is unlike the law of Illinois on that subject, and that the rule in that state is, that the purchaser of a lot bounded by a street, takes the title subject to the public easement to the center of the street; but the case clearly holds and so decides, that the general government by the subdivision, the making and recording of the plat, and the sale of the lots within that subdivision in pursuance of the plat, had absolutely divested itself of all private ownership in the land embraced within the subdivision. In other words, that the general government, in making a subdivision of its lands, and selling those lands in accordance with that subdivision, divested itself of all title and right of control over the property thus subdivided, including the streets and public grounds designated upon the plat of the subdivision, and that there was no distinction in that respect between the general government and a private citizen.

It appears by the opinion of the court (page 453), that the act of Congress, authorizing the laying out of the town of Dubuque included also various other towns within the limits of the State of Iowa, to which, of course, the

same rule of law would apply. The city or town of Galena, in Illinois, was laid out by the general government upon public lands, and the lots, within the territory so laid out, were sold and conveyed by the government in pursuance of the plat made by its authority, and there can be no doubt that the law prevailing in the State of Illinois at that time, as to the effect of town plats, would apply to the general government in the making of the subdivision and the selling of the lots embraced within it.

It is of little importance in this connection what principle of the law may be invoked to conclude the original proprietor of a subdivision from reclaiming the portion of the land set apart to the public use. It may be upon the theory, that he is presumed to have received compensation therefor in the enhanced price of the lots, or, as in the Iowa case, upon the theory of estoppel. The result to the public is the same in either case.

In *City of Cincinatti* v. *White's Lessees*, 6 Peters, 431, this court (pages 435, 436), says:

"It was admitted at the bar, that dedication of land for "charitable and religious purposes and for public high- "ways was valid without any grantee to whom the fee "could be conveyed. Although such are the cases which "most frequently occur, and are to be found in the books, "it is not perceived how any well-grounded distinction "can be made between such cases and the present. *The "principle, if well-founded in the law, must have a general "application to all appropriations and dedications for pub- "lic use*, when there is no grantee *in esse* to take the fee. "But this forms an exception to the rule applicable to "private grants, and grows out of the necessity of the "case. In these cases there may be instances, contrary

"to the general rule, where the fee may remain in abey-
"ance until there is a grantee capable of taking, where
"the object and purpose of the appropriation look to a
"future grantee, in whom the fee is to vest. *But the*
"*validity of the dedication does not depend on this; it will*
"*preclude the party making the appropriation from re-*
"*asserting any right over the land,* at all events, so long
"as it remains in public use, although there may never
"arise any grantee capable of taking the fee."

And, at page 438, in the same case, the court further says:

"*All public dedications* must be considered with refer-
"ence to the use for which they are made; and streets in
"a town or city may require a more enlarged right over
"the use of the land, in order to carry into effect the pur-
"poses intended, than may be necessary in an appropria-
"tion for a highway in the country; *but the principle, so*
"*far as respects the rights of the original owner to disturb*
"*its use, must rest on the same ground in both cases;*
"and applies equally to the dedication of the common as
"to the streets. It was for the public use and conven-
"ience and accommodation of the inhabitants of Cincin-
"nati; *and doubtless greatly enhanced the value of the pri-*
"*vate property adjoining this common, and thereby com-*
"*pensated the owners for the land thus thrown out as*
"*public grounds.*"

The evidence in this case shows, that the lots fronting on the public ground designated on the plat of "*Fraction-*
"*al Section 15 Addition to Chicago*" as "*Michigan*
"*Avenue,*" (which means a street) originally sold for much larger prices than other lots in the addition, *by reason of their frontage upon that avenue.* This result is so natural and so consistent with general experience and observation,

that comment upon it would be superfluous. The conclusion is, that both the state and the United States in the sale of the Lots in "Fractional Section 15" and "Fort "Dearborn" Addition, to Chicago, respectively, received full compensation for all the lands embraced within those additions, including all streets and public grounds, designated upon the plats of said additions, and that, by the sale and conveyance of the lots, they parted with every element of *private* ownership in such streets and public grounds—and, also, that the United States, thereby, *divested itself of all sovereignty and jurisdiction*, on the lands comprised within the boundaries of Fort Dearborn Addition.

The case of *New Orleans* v. *United States*, 10 Peters, 710, is in some of its aspects applicable to the case at bar, in that it holds that the sovereign authority may by acquiescence in a particular public use preclude itself from the right to assert an interest in land inconsistent with the public use established in relation to it. This is the doctrine of *prescription*, and it is respectfully urged that public as well as private rights may safely rest on that foundation. *It is unnecessary, however, to notice the doctrine of prescription in any case, when a positive grant can be shown.* The case is further important, for near the close of the opinion by Mr. Justice McLean, the doctrine is clearly announced that upon the organization of the State of Louisiana, the United States parted with all its sovereignty and jurisdiction over the grounds devoted to public uses, which it had acquired by the purchase of Louisiana territory from France.

VI.

The Illinois Central Railroad Company, by its charter, was granted not only a right of way 200 feet in width through the lands and waters of the state, but was also invested with authority to take possession af and use and own for the purposes contemplated by its charter, any lands, waters, materials and privileges belonging to the state, and by condemnation to acquire all such lands, etc., as the state did not own or control. Those grants of rights and authority are continuing ones, and without limitation.

Before entering upon the discussion of this proposition, and of the laws, which are specially important to the right determination of the pending appeal, and as preliminary to such discussion, the following propositions, as deductions from the facts and authorities already referred to, may properly be submitted.

1st. In 1851, the State of Illinois held the title to and right of disposition over, the submerged lands, bordering upon fractional sections 10 and 15, on the eastern frontage of the city of Chicago, and, in those submerged lands, the city of Chicago held no real or technical title, in trust, or otherwise.

2d. Whatever of title, as such, the city of Chicago then held, or ever has held, in any part of the shore of Lake Michigan, it held and always has held, as a mere agency of the state for public purposes, and without a semblance of private or beneficial ownership.

3d. Whatever of technical title the city may have held, as the agency of the state, that title, in its entirety, was at all times, subject to state control and disposition by legislation of the state.

4th. *In considering the effect of legislation*, the claims of the city, so long as they are confined to claims arising under its agency, may be and *must be wholly disregarded.*

5th. The jurisdiction of the city of Chicago for police purposes, is not a property interest or a proprietary right.

6th. The State of Illinois has never given or granted to the city of Chicago, any of its proprietary rights in any part of the premises here involved.

7th. As a consequence, necessarily flowing from the above premises, every valid grant of the state divested the city of any technical ownership in every part of the property in question, as well as its power of control over it, as an agency, and the city can make no claim as against such a grant.

8th. It follows, as a matter of necessity, that the decree of the court below, giving *substantial proprietary rights* in the submerged lands between Randolph street and Park row to the city of Chicago, was erroneous. Neither the facts nor the law justify, that part of the decree.

9th. *The fact*, that the charter of the railroad company required the consent of the corporate authorities of the city to the location of its line of road within the city limits, does not import any title or proprietary right in the city, in respect to that location.

At this point in the progress of this argument, the very able and exhaustive argument of the general counsel of the Illinois Central Railroad Company has been laid before me. An examination of it convinces me, that I should abridge my further suggestions in this case as much as possible; and this I will do.

It is almost impossible for the man of to-day, be he layman or judge, to fully comprehend and appreciate the conditions, which enveloped the State of Illinois and the city of Chicago, forty years ago; and yet the State of Illinois and the city of Chicago are the same responsible corporations now, as they were then. Neither of them is more competent to-day to do what was done in 1851 and subsequently, than it has been to do what they then, respectively, did, so far as their doings are material to the determination of this case. Whatever was legitimately done by them was as effective, for all practical purposes, in the earlier stages of their organizations as, it would be, or could be, if done now. All such acts are to be judged of, as to their propriety and policy, by conditions existing when the acts themselves took effect.

The ownership and control of the state and the agency or want of agency of the city of Chicago, in respect to the premises, were facts and necessary conclusions of law in 1851 and prior and subsequent thereto, to the same extent and with the same force, for all judicial purposes, that they are now, although they may not then have received the same amount of judicial endorsement. The propriety and policy of the grant, or of the sale and conveyance, made in 1851, or even in 1869, cannot be judged of by the conditions existing to-day; and yet the grants and the sale and conveyances, made in good faith, at the earlier dates must be maintained in their integrity, notwithstanding the change of situation. The validity and sufficiency of grants and conveyances do not depend upon their ultimate results of advantage or disadvantage. Considering the history of the past, we find it illustrated as a fact, that one man buys property, at a particular time, for a very inconsiderable sum, which ultimately yields him

millions of dollars. Another man buys for a million, and the million is lost. If the transactions are fair and honest, the results are not for the courts to consider.

In 1851, when the charter of the Illinois Central Railroad Company was passed, Chicago was a mud-hole, and the state of Illinois was just beginning to emerge from its protracted bankruptcy. What the state of Illinois and the city of Chicago are to-day, is a subject unnecessary to to enlarge upon. It may be submitted, as a fact, known to everybody, that the changes, that have intervened, have rendered the prices and values of fifty years ago utterly insignificant, when compared with the present ones; and yet, for these reasons, the transactions of those days cannot be impeached, abrogated or qualified.

The act, constituting the charter of the Illinois Central Railroad Company, was approved, and became a law *and a contract* on the 10th day of February, 1851. It was entitled "An Act to Incorporate the Illinois Central "Railroad Company." It is an act of legislation, which, *under this simple title*, contains many provisions, no one of which has ever been successfully assailed, and nearly all of which have been, from time to time, sustained by the courts of Illinois; and an essential one of the various provisions—deemed so at least by the State—has been made inviolable by the first of the "*Separate Sections*" appended to the constitution of Illinois, of 1870, which is in the following words:

"No contract, obligation or liability whatever, of the "Illinois Central Railroad Company to pay any money "into the state treasury, nor any lien of the State upon, or "right to tax property of said company in accordance "with the provisions of the charter of said company, ap-"proved February 10th, in the year of our Lord 1851,

"*shall ever be released, suspended, modified, altered re-*
"*mitted, or in any manner diminished or impaired by*
"*legislative or other authority*, and all moneys derived
"from said company after the payment of the state debt,
"shall be appropriated and set apart for the payment of
"the ordinary expenses of the state government, and for
"no other purposes whatever." *This is a constitutional adoption and ratification of all and every of the grants rights, powers and privileges made to and conferred upon the company by its charter or otherwise.*

The charter of the Illinois Central Railroad Company was passed shortly after the adoption of the Illinois constitution of 1848, and whilst all the provisions of that constitution, as originally adopted, were in full force. It is set out in full on pages 611 to 623 of the printed record. Section 3, so far as is important (Rec., 612), is as follows—the italics being my own:

"Sec. 3. The said corporation shall have the right of
"way upon, and may appropriate to its sole use and
"control, for the purposes contemplated herein, land not
"exceeding two hundred feet in width through its entire
"length, *may enter upon and take possession of and use,*
"*all and singular, any lands, streams and materials of*
"*every kind, for the location of depots and stopping*
"*stages, for the purpose of constructing bridges, dams,*
"*embankments, excavations, station grounds, spoil banks,*
"*turn-outs, engine-houses, shops and other buildings neces-*
"*sary for the construction, completing, altering, maintain-*
"*ing, preserving and complete operation of said road.*
"ALL SUCH LANDS, WATERS, MATERIALS AND PRIVI-
"LEGES, BELONGING TO THE STATE, ARE HEREBY
"GRANTED TO SAID CORPORATION FOR SAID PURPOSES;
"but when owned or belonging to any person or corpo-

"ration, and cannot be obtained by voluntary grant or "release, the same may be taken and paid for, if any "damages are awarded, in the manner provided in 'An "'act to provide for a general system of railroad incor- "'porations,' approved November 5, 1849, and the final "decision or award shall vest in the corporation hereby "created all the rights, franchises and immnnities in said "act contemplated and provided; provided, etc."

Section 15 (Rec., 616), in the initial part of it, provides as follows:

"Sec. 15. For the purpose of securing the con- "struction of said road and branches, the right of way "and all the lands, which may be selected along the lines "of said road and branches, within this state, under a "grant made by the government of the United States to "the State of Illinois, by virtue of 'An act granting the "right of way and making a grant of land to the States "of Illinois, Mississippi and Alabama, in aid of the con- "struction of railroad from Chicago to Mobile,' "passed September twentieth (20th), eighteen hundred "and fifty (1850), *and also the right of way which the* "*State of Illinois has heretofore obtained along or on the* "*line of said railroad and branches, as heretofore located* "*and surveyed for the use of the same, as well as* "*the lot of ground obtained by the state within the city of* "*Cairo for a depot, and all the grading and embank-* "*ments, excavations, works, materials, personal property,* "*profiles, plats and papers, constructed, procured, furn-* "*ished and done by or in behalf of the state for or on ac-* "*count of said road and branches,* ALSO THE RIGHT OF "WAY OVER AND THROUGH LANDS OWNED BY THE STATE, "ARE HEREBY CEDED AND GRANTED TO SAID CORPORA- "TION *for the only and sole purpose of surveying, locating,*

"*constructing, completing, altering, maintaining and oper-*
"*ating said road and branches as in this act provided,* and
"in the manner following, that is to say," etc.

There is nothing in the charter in qualification of the absolute right of location and appropriation of property, thus conferred upon the company, excepting the concluding clause of the eighth section, to which reference has already been made, which says (Rec., 614): "Nothing "in this act contained shall authorize said corporation *to* "*make a location of their track* within any city without "the consent of the common council of said city." Further comment upon this qualification is unnecessary.

By the first section of the act, the general powers of the corporation are defined, and amongst other things it is provided, that the company, "by their said corporate "name and style shall be capable in law of contracting "and being contracted with, *shall be and hereby is invested* "*with all the powers, privileges, immunities and franchises,* "AND OF ACQUIRING BY PURCHASE OR OTHERWISE, AND "OF HOLDING AND CONVEYING REAL AND PERSONAL ES-"TATE WHICH MAY BE NEEDFUL TO CARRY INTO EFFECT "FULLY THE PURPOSES AND OBJECTS OF THIS ACT."

The charter is without limit of duration, and is, therefore, a grant of rights and powers in perpetuity, and the provisions of the charter, above quoted, are grants of property rights, powers and privileges, which are continuing in their purpose and effect. The location of the right of way, or as it is called in the charter, *the road* of the company, within the city of Chicago, was properly made with the consent of the common council of the city. Between Park row and Randolph street, it was unquestionably made in the open waters of Lake Michigan, and there its railroad was constructed and has ever since

been maintained and operated. The land under these open waters was, *undoubtedly*, the property of the state, at the time of such location and construction, and upon the location, when made, the grant of the state, contained in the charter, took effect, as a grant of all the title of the state in such location. The grant of the state, contained in the charter, took immediate effect as a conveyance of all the right, title and interest of the state in and to the submerged lands upon and over which that location was made. That grant involved, also, all the rights, nominal and in trust, whatever they may have been, *if anything*, of the City of Chicago in that location, and *withdrew the property* absolutely from the exercise of any power of agency in behalf of the public, or of the state, which the city may have possessed. *The grant of the principal must, in effect, cancel the powers of the agency in respect to the premises, which were so granted.*

But the grant of the state was not exhausted by the location of the right of way and the construction of the railroad tracks upon it, and for the simple reason, that the grant was more extensive in its scope and purpose than the mere location of the right of way 200 feet in width; for in addition to the right of way the third section provides that it (the company) "may enter upon and take "possession of and use, all and singular, any lands, "streams, and materials of every kind for the location of "depots and stopping stages, for the purpose of con- "structing bridges, dams, embankments, excavations, "station-grounds, spoil-banks, turn-outs, engine-houses, "shops and other buildings necessary for the construction, "completing, altering, maintaining, preserving and com- "plete operation of said road," and the language of the

grant is as broad as the permission to enter upon and take possession, for it says, following the above quotation, "All such lands, waters, materials and privileges belonging to the state, are hereby granted to said corporation "for said purposes."

There is in this grant from the state, no limitation upon the power of the corporation to appropriate and apply to the general uses of its road and the operation thereof, any property which the state may own; and the continuance of that grant is as broad and unlimited, as the right to take private property by purchase or condemnation; and whatever may have been the theory of courts in the early days of railroad construction in this country, it would not be contended to-day, that the right of a railroad company to acquire property necessary or convenient for its uses, as such, either by purchase or condemnation, was not a continuing power, capable of use, from time to time, as the exigencies of the business of the company might require. Therefore, *it must be conceded*, that the right to take and appropriate the triangles of land next to Randolph street in 1855 and 1856, and the additional triangular piece of land, appropriated and put to use as shown upon the Morehouse map, later in the development of the business of the company, and in the year 1873, was fully justified by the language of the charter itself, and that so far as the state itself is concerned, the powers of the charter are broad enough to authorize the railroad company to go further into the lake and take and appropriate further tracts of submerged lands *belonging to the state*, as its necessities and conveniences may, from time to time, require.

There has never been a time, when the city of Chicago

could rightfully fix a limit to this grant of the state and to the exercise of this power of appropriation and use. In saying this, I do not mean that there is no power anywhere to prescribe a limit to such appropriation; but I do mean to say *that such a power does not lie with the city of Chicago.*

If the city of Chicago had no power to fix a limit upon this right of appropriation, and the right is a continuing one, as the necessities for its exercise may develop from time to time, then it follows, as a matter of course, that that part of the decree of the court which holds that the railroad company, by its failure to appropriate the additional 100 feet on the east side of its right of way and breakwater, as expressed in the Ordinance of the city of 1852, within a reasonable time, *or within any time*, has lost its right to further extend its appropriations into the lake, *is erroneous.* The railroad company acquired no title or right of appropriation from the city. All this came to it *directly* from the state. The required consent of the city to the location of its road was not a grant of proprietary right; it was simply a consent to a location, upon which the grant of the state took effect immediately upon the selection of and consent to that location. The decree in the respect referred to, assumes that the company claims some right title or interest under or by virtue of the ordinance or ordinances of the city of Chicago; but this assumption is not sustained by the facts of the record. What the city did not grant and could not grant, it has no power to fix a limitation upon; and the Circuit court was not justified in holding, in favor of the city that the railroad company was limited to any time, definite or indefinite, within which to exercies the powers specially granted to it by its charter.

It is difficult to understand upon what theory of the law, the Circuit court held, in its decree (Rec., 223) "that if "the city could, consistently with the charter of said "company, grant to it, as by said ordinance of 1852 it "assumed to do, the right to use for its line of road and "other works necessary to protect the same from the lake, "a width of 300 feet from the southern boundary of Lake "Park, near 12th street, to the northern line of Randolph "street, *the said company has elected to appropriate for "such a purpose a width of only 200 feet, and cannot now, "without further license from the proper public authority, "appropriate a greater width.*"

An important part of this suggestion and finding of the decree is, that the railroad company "has elected to ap- "propriate for such a purpose (all the purposes specified "in its charter) a width of only 200 feet;" *and that is not true.*

The suggestion ignores the prospective necessities of the company. It ignores the fact, that it was prudent and right for the company to avail itself of its powers, as necessity demanded their exercise. It ignores the law, that a grant of title and right, coupled with the power of propriation conferred by the sovereign authority for public uses, *has no limitations*, unless the limitations are fixed in the granting act itself. It further ignores the fact, *abundantly supported by the record*, that the railroad company has occupied and used parts of the one hundred feet in width, beyond the two hundred feet right of way, almost continuously, for projections in support of its breakwater and tracks, and that it has taken possession of and used, *under the authority of its charter alone*, and without reference to city authorities, parts of the 100 feet in width, as the accumulation of its business

necessities required. The suggestion also ignores (and this may be in excuse for much of the company's delay in availing itself of a *mere and unnecessary permission of the city*), the fact abundantly established, that its *projected* improvements to the eastward of its right of way and breakwater, *have been obstructed and prevented by injunctions of the courts* and objections of the War Department of the United States, equivalent to injunctions, and that its plans for the development of those improvements have been waiting upon the decision of the courts, now finally to be reached, *as to the beneficial ownership of the shore of Lake Michigan.*

It may be well and truthfully said, that, in the earliest stages of its construction and operation, the Illinois Central Railroad Company had no occasion to use more than the 200 feet of right of way between Park Row and Randolph street, and that later, when the necessity of further appropriations and use of the land under water, east of that right of way, had been developed, and when, by reason of such necessity, *it proposed to make further appropriation in pursuance of the grants of its charter*, IT WAS PREVERVED FROM SO DOING BY AUTHORITIES WHICH IT WAS COMPELLED TO RESPECT.

There is no evidence in this record which can be construed into *an intention on the part of the Illinois Central Railroad Company to abandon any of the rights or privileges, immunities and protections, granted to it by its charter, and there is nothing to show that the city of Chicago, in any capacity, whether as an owner or an agency*, has any right to consider or decide any question relating to the termination of those grants, the matter submitted to its common council being the matter of *mere consent* to the location of the road within the city limits, and this consent was given, *and thereby its authority was ended.*

I beg the court will understand that in these broad statements the sovereignty of the state in matters of general jurisdiction and the police powers of the state, and its agency, the city of Chicago, are not included. I am trying to make a distinction, which to me seems absolute, between property rights and police jurisdiction. Every element of constitutional protection is wiped out, if this distinction is not observed.

Sovereignty may make irrevocable grants and contracts. It will not do to say that, underneath such grants and contracts, there lies an undefined and irresponsible power, either in the sovereignty or its agency to annul, or make ineffectual, such grants and contracts. *Constitutions, both state and federal,* under which such grants and contracts are protected, prevent such a result. *We do not live under governments of unlimited police powers;* hence, *police powers do not override constitutional protection.*

I have included in the foregoing suggestions all that I would deem it desirable to say under divisions VII and VIII of the brief of the argument.

VII.

The act of the general assembly of the State of Illinois, of April 16, 1869, entitled, "An act in relation to a "portion of the submerged lands and lake park grounds "lying on and adjacent to the shore of Lake Michigan, "and on the eastern frontage of the city of Chicago," commonly known as "the Lake Front Act," was a valid act of legislatiou passed in a constitutional way, and must be given effect to as such. To this must be added the further suggestion, that in addition to being a mere act of legislation, IT CONTAINED IN ITSELF AND BY VIRTUE OF ITS TERMS, SPECIAL AND SPECIFIC GRANTS OF PROPERTY AND PROPERTY RIGHTS THEN OWNED AND CONTROLLED BY THE STATE, *and the disposition of which was subject to the will and descretion of the general assembly of the state, as its legitimate representative.*

The rights of the Illinois Central Railroad Company, involved in this proceeding, have thus far been considered without reference to the act of the general assembly of the state of Illinois, above referred to. If it were admitted as a fact to be considered in the determination of this case, *that the developemnt of the commercial interests of the State of Illinois and especially of the city of Chicago*, as a part of the state, *required an outside harbor*, with the usual commercial facilities incident thereto, such as wharves, piers, landing places and other conveniences for the loading and discharging of freights and passengers transported by water (*all of which would seem to be conceded by the information, and so far at least, as is thus conceded, is admitted by the general pleadings*), *it would be entirely con-*

sistent with the facts and probabilities, to say that the state and the people of the State, the city of Chicago and the people of the city, UNFORTUNATELY MISREPRESENT THEMSELVES AND THEIR INTEREST IN THESE PROCEEDINGS, *by contesting the validity and obstructing the execution of the Act of April 16, 1869.* No man, who understands the situation, or who has any disposition to comprehend the relations which exist, as matters of necessity, between the desirable purpose to be accomplished (if that is conceded), and the accomplishment of it, could for a moment press the objections which are now urged against the Act of 1869, except as mere questions of *technical* right, or with any expectation, that the commercial interests of the state, or of the city, could be or would be better subserved by judicial support given to the claims presented by them, respectively, in their separate pleadings in this case, then they would be by a decree, validating, that Act in all its parts. Assuming the desirability of the outside harbor, with all its incidents and conveniences for commercial purposes, and that the State of Illinois, as it claims to be in the information, *is the sole possessor* of the right to make the necessary harbor improvements by the construction of wharves, etc., or that the city of Chicago, *as it claims in its answer and cross-bill*, is possessed of the sole right to take charge of and make these desirable improvements, IT MIGHT BE PERTINENTLY ASKED, what prospect is there that such improvements would be made either by the state or the city, to meet the public necessities or conveniences? And, if they could be undertaken by either of these public authorities, and prosecuted to completion, from what sources would the necessary millions come for their accomplishment? It is easy to affirm, that grants made to

the Illinois Central railroad by the "Lake Front Act" are valuable. It costs nothing to insert such a statement in the information or in the public press, or in a veto message of a governor, and yet it is true to-day, as it was true in 1869, that those grants, in their integrity were and are absolutely worthless, *and that development alone can make them valuable.* THEIR ENTIRE VALUE DEPENDS UPON DEVELOPMENT.

In this connection, I beg leave to cite an illustration, using it only in so far as it illustrates the idea which I wish to convey.

The Illinois and Michigan canal, as built and in use in 1870, was through the middle of a right of way near Chicago, leaving ninety feet of ground unoccupied either side of the actual canal. This surplus of right of way on either side of the canal, except the tow-path, was used for a dumping ground for material taken out of the bed of the canal, and for no other purpose whatever. The owner of an eighty acres of land, abutting upon this right of way, proposed to the state, in view of benefiting his own property, of course, a contract, by which he would agree to widen and deepen the canal and make it a navigable channel, and properly dock it on the side adjacent to his property, and keep the improvements in proper condition for a specified period, *for the privilege of using the ninety feet of waste land adjacent to his property* in the manner indicated, and, possibly, for a nominal rent. The proposition was submitted to and approved of by the executive authorities of the state, and the contract was partially executed. Pending its complete execution, the General Assembly of the state was in session, and the matter of the contract was brought before the House of Representatives by a reso-

lution of inquiry, in 1871. The resolution was referred to the committee upon canals. The proposed contract was objected to by that committee, *upon the ground that the ninety-foot strip along the canal*, encumbered as it was, *was worth a million of dollars to the state*, and the report of that committee, *upon that basis*, was against the completion of the contract.

The ninety feet of ground along the side of the canal remains in the same condition to-day that it was in 1871. It is good for nothing to-day; it was good for nothing then. The judgment of that committee, which controlled legislative action, rested upon a basis apparently inadmissible, as a matter of business. And so it is and has been with the outer harbor of the city of Chicago. The state and the city, whatever their rights may have been *originally*, and whatever their rights may be to-day (and these rights as they claim them, if their claims are valid, have been continuously in force for sixty years), have never developed any outer harbor or any improvement of interest to the public, and it may be safely said, that *these authorities never will and never can*, make such developments as the occasion requires, if an outer harbor is desirable, and that, by some recognized and lawful means, *private parties or private parties under the form of corporate organizations, must develop the possibilities of such an outer harbor, or the development will never take place.*

The United States does not build docks and wharves for the accommodation of general commerce. It supervises the construction of such wharves and docks, but only constructs such protections in respect thereto, as the *public* interest may require. The State of Illinois has never built, or proposed to build, a dock within the limits of the city of Chicago. It is

safe to say, that it never will do it, and that it cannot and will not appropriate the public moneys for such a purpose. The city of Chicago has authority to supervise, in a limited way, the construction of docks and wharves in the city of Chicago and to build docks *at the foot of public streets* and, under its police powers, to regulate the use of the docking privileges of the city; but it has no power to build docks and wharves in the open waters of Lake Michigan, within the limits of the property covered by the information in the present case, nor has it now, nor has it for the past thirty years, nor, as far as appears will it ever have, the means for doing this. *If it is a desirable thing* that docks should be built upon the frontage of Chicago upon Lake Michigan, east of the Illinois Central Railroad Company's right of way, and between that and the breakwater erected by the United States, and make of what is now nominally called *the outer harbor*, an outer harbor in fact, with conveniences for the commercial interests of Chicago, *there is no probability, indeed there is no possibility*, that that desirable thing can ever be or ever will be accomplished by the State of Illinois, or *its agency*, the city of Chicago.

The pretense of right to do this, presented by the state and the city, is a duplication of the fable of the dog in the manger. *This pretense* of a bald, unproductive and naked right is sustained by the decree of the court below in favor of the city, *against positive legislation of the state*, which its agency, the city of Chicago, has no right to question, and the effect of which, the city, as an agency of the state, is estopped from denying; *for, by the act of 1869, the state granted to the Illinois Central Railroad Company all its right, title and interest in the submerged*

lands east of its right of way and breakwater, for the distance of one mile, between the south branch of the Chicago river and the north line of lot 21, which, by the record is shown to be but little north of the north line of 16th street, and this description covers all the grounds embraced in the act of 1869, which are described as SUBMERGED LANDS, outside of the railroad company's construction.

On the hearing of this case in the Circuit court, many objections of a teehnical nature were made to the validity of the Lake Front Act of 1869. These objections are fully met, considered and disposed of in the brief of the general counsel of the railroad company, and by his reference to the authorities, bearing upon the questions, which is full and exhaustive. If the same objections are renewed upon the hearing of this appeal, the answer to them has already been made. To that answer, I can only add a few suggestions.

The decree of the Circuit court, (Rec., 223, 4) is a recognition of the validity of the Lake Front Act. It admits that the act was constitutionally passed; that the objections made against it, or the forms of its passage, are of no importance, and that, until the repealing act of 1873 was passed, *it was a law and a contract of the State of Illinois;* but it holds that the repealing act (which will be hereafter considered) took away from it, its most important and substantial efficiency, *as a law and a contract*, and by a process of *absorption*, unknown in honest business transactions, took back to the state, a large part of what the state had granted. The opinion of the court does not relieve the decree of its peculiar and iuadmissible quality in this respect.

It will be assumed, for the present at least, that the act was in itself legitimate, and was constitutionally passed

by the general assembly, and it must be admitted, *that the subject-matter of the act was one wholly within the control of the legislative authority of the state.*

This statement, abundantly sustained by the decisions of this and other courts, to which reference has already been made, *of itself*, disposes of many of the technical objections, which have been made to the validity of the act; but it is still important to know exactly what the act itself means, what it grants or authorizes, or what, if anything, it withholds, and when and how and for what reason, *if any*, the act can be good for one purpose and not good for all the purposes clearly expressed upon its face. We must look to the act itself for an answer to this inquiry, for there is nothing in the decree, or in the opinion of the Circuit court, except a mere opinion (I would rather say *dictum*) which casts any light upon the situation.

The act must be interpreted by itself and in view of the conditions prevailing at the time of its passage, to which some reference has heretofore been made. It is set out on pages 364 to 367 of the printed record. It was passed (and this is no discredit to it) over a governor's veto, also contained in the record on pages 562 to 573. This veto message of the governor, now Senator John M. Palmer, is, possibly, as strong an argument in support of the validity of the act, if passed over his veto, as can be presented. The veto message urges, as its foundation, simply considerations of policy and of value, the latter upon information only. When the act was passed over the veto, the question of policy and of value was settled by a power higher in the administration of state affairs than the opinion of the governor. The message admits that the act, if passed, would conclude the state

from claiming the proprietary and other rights granted by it; and, yet, the general assembly passed the act, the governor's objections notwithstanding. The reasoning of the governor in respect to the effect of the law is admitted. His objections on the ground of policy and value were overruled by an authority which was constitutionally above the gubernatorial office. The Illinois Central Railroad Company has Senator Palmer's opinion, then governor of Illinois, in support of the effect of the act of 1869, as claimed for it by the company, and the present question is—what does that act say and mean?

The act itself is suggestive of the conditions, then existing in respect to the property included within its provisions, and it must not be forgotten or overlooked, *that the grants made by the act are grants "of all the right, "title and interest of the State of Illinois."* It is insisted, of course, that such a grant carried with it all the technical title of the city of Chicago, as an agency of the state, if it had any such title.

The first section of the act (Rec., 634) as to the premises described in it, is not involved in this litigation. It is referred to as showing, in part, what the General Assembly intended to provide. It covers only the land in fractional section 15, which "is situated east of Michigan "avenue and north of Park Row and south of the south "line of Monroe street, and west of a line running paral- "lel with and four hundred feet east of the west line of "said Michigan avenue, being a strip of land four hun- "dred feet in width, including said avenue, along the "shore of lake Michigan, and partially submerged by "the water of said lake." This actually and *legislatively* describes the situation.

All the premises, described in the above quotation (no part of which is included in the pending proceedings), are by the first section of the act, "*granted in fee to the* "*said city of Chicago*, with full authority to sell and convey "all said tract east of said avenue, leaving said avenue "ninety feet in width, in such manner and upon such "terms as the common council of said city may by ordi- "nance provide."

Section 2 of the act simply provides for the disposition of the proceeds of the sale of the property, *granted in fee* to the city of Chicago, described in section 1. These sections have never been acted upon. Their effect, standing by themselves, is here immaterial.

Section 3 of the act (Rec., 635) is important in its relations to the present case, and its *exact language* must be considered. It reads as follows:

"SEC. 3. The right of the Illinois Central Railroad "Company, *under the grant from the state in its charter*, "*which said grant constitutes a part of the consideration* "*for which the said company pays to the state at least seven* "*per cent. of its gross earnings*, and under and by virtue "of its appropriation, occupancy, use and control, *and the* "*riparian ownership incident to such grant, appropria-* "*tion, occupancy, use and control in and to the land sub-* "*merged, or otherwise, lying east of the said line, running* "*parallel with and four hundred feet east of the west line* "*of Michigan avenue, in fractional sections ten* (10) *and* "*fifteen* (15), *township and range aforesaid, is hereby con-* "*firmed, and all the right and title of the State of Illinois* "*in and to the submerged lands, constituting the bed of Lake* "*Michigan, and lying east of the tracks and breakwater of* "*the Illinois Central Railroad Company, for the distance* "*of one mile, and between the south line of the south pier*

"*extended easterly, and a line extended eastward from the*
"*south line of lot twenty-one, south of and near to the*
"*round-house and machine-shops of said company, in the*
"*south division of the said city of Chicago,* ARE HEREBY
"GRANTED IN FEE TO THE SAID ILLINOIS CENTRAL RAIL-
"ROAD COMPANY, ITS SUCCESSORS AND ASSIGNS; *Pro-*
"*vided, however, that the fee to said lands shall be held by*
"*said company in perpetuity, and that the said com-*
"*pany shall not have power to grant, sell or con-*
"*vey the fee to the same,* and that all gross
"receipts from the use, profits, leases, or otherwise
"of said lands or improvements thereon, or that may
"hereafter be made thereon, shall form a part of the
"gross proceeds, receipts and income of the said Illinois
"Central Railroad Company, upon which said company
"shall forever pay into the state treasury, semi-annually,
"the percentum provided for in its charter, in accord-
"ance with the requirements of said charter; and *pro-*
"*vtded* also, *that nothing herein contained shall authorize*
"*obstructions to the Chicago harbor or impair the public*
"*right of navigation; nor shall this act be construed to*
"*exempt the Illinois Central Railroad Company, its*
"*lessees or assigns from any act of the general assembly*
"*which may be hereafter passed, regulating the* TAXES *of*
"*wharfage and dockage to be charged in said harbor;* and
"provided further that any of the lands hereby granted
"to the Illinois Central Railroad Company and improve-
"ments now or which may hereafter be on the same,
"which shall hereafter be leased by the said Illinois Cen-
"tral Railroad to any person or corporation, or which
"may hereafter be occupied by any person or corpora-
"tion other than said Illinois Central Railroad Company,
"shall not during the continuance of such leasehold

"estate or of such occupancy, be exempt from municipal "or other taxation."

The fourth, fifth, sixth and seventh sections of the act are in nowise involved in respect to the property in controversy in this case. The seventh section, however, may be appropriately referred to, for the reason, that in respect to the premises, which were granted and confirmed, by the act itself, to the Illinois Central Railroad Company, namely, all the property, which it had, at that time, appropriated and made use of for the general purposes of its organization, and such other property as the act itself specifically granted—the section provides that "the grants to the Illinois Central Railroad Company "contained in this act, are hereby declared to be upon "the express condition that said Illinois Central Railroad "Company shall perpetually pay into the treasury of the "State of Illinois the percentum on the gross or total "proceeds, receipts or income derived from said road "and branches stipulated in its charter, and also the per-"centum on the gross receipts of said company reserved "in this act." This clause of the act was simply anticipatory of the provisions of the constitution of 1870, already referred to, and which puts the obligations of the Illinois Central Railroad Company to the state beyond legislative control and jurisdiction. The court will, also, observe, that the act was passed and in force before the state constitution of 1870 was adopted and became effective as the *fundamental* law of the state.

The third section of the Lake Front Act, as a confirmatory act, is a grant to the Illinois Central Railroad Company, which cures all defects of title, if any, in respect to all the lands originally belonging to the state, actually in the use and occupancy of the company by authority of its

charter or otherwise, and bars the state and its agency, the city of Chicago, from insisting upon or claiming any proprietary interests in such land as against the company.

It is more than this. It recognizes as a fact, that the title, which the company had, and which was thereby confirmed, had started a new line of *riparian ownership*, to which the rights of the company, as a *riparian owner*, could attach, and upon which such rights could be predicated; and fully justifies the claims of the company to the right to connect that new shore line by suitable structures, in its own interests and in the interest of commerce and navigation, through the shallow waters, adjacent thereto, with waters navigable in fact. The right and power of the state to do this cannot be denied; for, according to the authorities, which have already been referred to, the state, at the time the charter of the Illinois Central Railroad Company was passed, was the substantial and beneficial owner of all the lands, submerged or otherwise, lying between the west line of Michigan avenue and the eastern boundary of the state, such eastern boundary being, substantially, the middle of Lake Michigan.

Under these conditions there is no legal escape from the proposition, that the state, by appropriate legislation, could fix and establish a new shore line, to which all the rights of riparian ownership would immediately attach. The state was dealing with public rights and public property, every element of which is subject to legislative control and disposition. It is the *right, title and interest of the* State of Illinois, and of the city of Chicago, not as policemen, but as claimants of proprietary rights, with which this case is concerned; and when an admittedly valid act of legislation, passed in respect to a public interest, says that "all the right, title and interest of the

"State of Illinois * * * are hereby granted in fee," such language cannot be twisted, under any established rules of law, into the grant of a mere license, revocable at the pleasure of the grantor. The language and such a result do not harmonize, *and they cannot be reconciled.*

A plain and practical principle of the law stands across the pathway of the decree of the Circuit court in this respect. Briefly stated, and without attempting to follow definitions either of courts or writers of law-books, it may be said, that it is not within the power of one party to a contract to abrogate it, unless the power is expressly given by the contract itself. This is a general principle, more important in its integrity, than the possible results of any particular case, if any such should arise, in which the application of the principle might seem to produce a hardship. It is the doctrine of the Dartmouth College case, all deviations from which, if any, lead to uncertainty, as to private rights, which it was the purpose of our constitutions to protect, and give encouragement to the chaotic theories of socialism and anarchy.

A grant in fee is not a mere license; and there is no legitimate authority in a court to reduce the broad properties and proportions of the one to the slender properties and proportions of the other. This statement puts the case of the Illinois Central Railroad Company, as against the decree of the Circuit Court, strongly, perhaps, and this, so far as I can, I mean to do.

The decree of the Circuit court admits, that the Lake Front act of 1869 was a valid act of legislation. That act *granted* to the Illinois Central Railroad Company, by its exact terms, certain of the property of the state *in fee;* the decree reduces this *grant* to the proportions of a license, revocable at the pleasure of the grantor. .

There is no evidence in the record, that the grant was intended to be a mere license. There is nothing before the court upon which to determine the intention of the legislature in making the grant, except the language of the grant itself. If the decree is right, a man may make a grant of land to-day, and, by his own act, revoke it to-morrow, and re-invest himself with his former ownership. This cannot be admitted as a rule, applicable to transactions between private parties, and the same rule of honesty must be applied to cases, in which the grants of the state are involved.

I again call attention to the exact language of the act of 1869. The words of the third section are ordinary words, direct and simple, and must have an effect according to their obvious and ordinary meaning. There is nothing ambiguous about them. Interpretation, and not construction, is all that is necessary to an understanding of them. They are (so far as now important), "*and all* "*the right, title and interest of the State of Illinois in and* "*to the submerged lands constituting the bed of Lake* "*Michigan, and lying east of the tracks and breakwater of* "*the Illinois Central Railroad Company, for the distance* "*of one mile, and between the south line of the said pier* "*extended easterly to a line extended eastward from the* "*south line of lot twenty-one south of and near to the round-* "*house and machine shops of said company in the south* "*division of the said city of Chicago,* ARE HEREBY "GRANTED *to the Illinois Central Railroad Company, its* "*successors and assigns.*"

I would be disposed to censure myself severely, if, under instructions from a client to draft for him a revocable license, I should insert in the draft the language of the grant contained in the clause of the act of 1869 above

quoted. My client, certainly, would have good reason to complain, if relying upon my professional capacity to give effect to his instructions, he signed the document with such language included, upon the understanding that it was a license merely. It ought to be assumed, and it must be assumed by the court, in the absence of evidence to the contrary, (even if such evidence would be competent,) that the General Assembly of the State of Illinois understood the meaning of the common language of the law made use of in the act of 1869. The meaning of the language largely controls the result of the pending appeal in respect to the title to the submerged lands, east of the tracks and breakwater of the Illinois Central Railroad Company, as located and constructed in 1852, within the limits above indicated.

The postion of the railroad company is, that the act of 1869 was, as it professes to be, *a grant* of all the right and title of the state *in fee*, and that the city of Chicago had no right or title, which it can assert, or can be heard to assert, against this grant.

But it has been said that there is a *proviso* or condition, appended to the grant which is inconsistent with its full operation and, therefore, the grant itself is ineffectual. Such a position is readily answered.

First. It reverses the rule of construction well settled in the law, that when a condition is attached to a grant, inconsistent with the grant, *the grant must prevail and the condition must give way.* I should waste the time and patience of the court if I undertook to cite authority in support of this proposition.

The awkward dilemma of the state and of its agency, the

city of Chicago, upon this question, is quite beyond belief, except by abandoning the objection. The argument of the state and of the city would seem to be somewhat as follows: "There was granted to the Illinois Central "Railroad Company certain property and property rights "*in fee simple*, and the grant was accepted and has been "acted upon by the company. There was attached to "that grant, a condition also assented to by the company, "but which, attorneys say, was inconsistent with the grant "as it is made, *therefore*, under the advice of counsel, we "will take advantage of the void condition and repudiate "the grant." Such reasoning does not pass as current, legal logic between individuals, and new lights must arise upon the waste places of judicial knowledge, before such logic can avail for public authorities.

Second. The condition or proviso, above referred to, is one against alienation by the railroad company. Similar provisions were evidently under review in the case of *Lavelle* v. *Strobel*, 89 Ill., 370. The question is treated of, here and there, in the opinion of the court, which is a lengthy one, and more especially, perhaps, on pages 378, 379 and 380, to which attention is called. It does not seem, however, to have entered into the mind of the court or of the attorneys in the case, that the conditions of the legislative grant, restrictive of alienation, in any way affected the validity of the grant itself; and it may be assumed, I think, without much fear of contradiction, that the sovereign state of Illinois may, by appropriate laws for that purpose, and in its capacity as a sovereignty, grant property and property rights belonging to the state, and annex to the grant exactly such conditions as may be deemed proper in view of the public interest, pertaining to the special grant. The general laws against perpetui-

ties would not apply in such cases, and for the reason, that the state, in respect to its own interests, may suspend or abolish such law. I merely mean to insist, that it was competent for the state, in its sovereign capacity, by legislation, and in the disposition of its own property, to do and authorize exactly what it did and authorized by the act of 1869.

The state is the guardian of public interests, and, in that behalf, the general assembly is its representative. The interests dealt with by the act of 1869, were public interests, and the state, by that act, was dealing with interests of a public character and with a corporation of its own creation. The state, the public interest, and the corporation, were of perpetual duration. There was no reason for suspicion, that any one of them would survive the others. The state being the owner of the bed of Lake Michigan within its boundaries, through its general assembly, representing the state and the public interest, granted the title of so much of that bed as is here involved, to the Illinois Central Railroad Company, with restrictions as to alienation and use, *which keep the public interest forever in its control.*

This is the legitimate effect of the *proviso*, following the first part of section 3 of the Act of 1869 already recited. The clause against alienation was evidently intended to keep the property, to which a public interest would always attach, more completely within the control of the state for purposes expressly stated in the *proviso.*

If the state will not accept this construction, the alternative is, that the clause against alienation is void. As was said in the case of *Lavelle* v. *Strobel*, the explanation makes harmonious the provisions of the Act. The Illinois

Central Railroad Company does not seek to disturb this harmony. The company accepted this Act of 1869 and all the provisions of it. If a formal acceptance could be deemed desirable or necessary to the full operation of the Act, that formal acceptance is shown in the record. But if the allegations of the information are true, no such formal acceptance was necessary; for the information alleges that the Illinois Central Railroad Company procured the passage of the Act of 1869; and if that averment is true, no formal act of acceptance would be necessary in order to the taking effect of the act in all its provisions. Again, it may be fairly concluded, as a result of the record in this case, that the Illinois Central Railroad Company regards the rights and privileges secured to it by the Act of 1869, as beneficial to itself. It would not otherwise, probably, be contending for the rights and privileges apparently granted by said act. The principle of the law is, that *beneficial* grants are presumed to have been accepted by the grantee; and so, on each and every of these grounds, the court must find, as a matter of fact, that the Illinois Central Railroad Company acquiesced in and accepted, so far as it was an interested party, all the terms and provisions of the Act of 1869.

VIII.

The act of the General Assembly of the State of Illinois, of April 15, 1873, (Rec., 609) purporting to repeal "the Lake Front Act" of April 16, 1869, was, if not absolutely vaid, wholly ineffectual to divest the title and rights of the Illinois Central Railroad Company, granted to it by the earlier act, the provisions of which had been accepted by the company.

The claim of the state and the city of Chicago in these proceedings, largely given effect to by the decree of the Circuit court, is, that the repealing act operated to divest the Illinois Central Railroad Company of everything, that had been vested in it by the act of 1869, except so far as the act of 1869 was a *confirmatory* act. In other words, the claim is, that the revocation by the grantor in a deed, duly executed, delivered and accepted, revests the title granted by the deed in the grantor. It is not necessary to argue against the proposition as thus formulated. Assuming, however, what would seem to be fully established, that the act of 1869 was valid, all the elements of the proposition are present in this case. *The act itself was a completed grant.* Whether applied for by the Illinois Central Railroad Company or not, it was in effect an enlargement of its rights and privileges, and therefore presumptively for its benefit. The rights, thus granted, attached at once, and became vested rights, which cannot be *divested without the consent of the grantee or by due process of law.* An individual has no power to revoke or make void, his own independent grant or contract, when no such power of revocation is reserved in the grant itself. Such an attempt, on the part of the state, must be void and without effect.

The case of *Fletcher* v. *Peck*, 6 Cranch, 87, is the leading case in this country upon this subject. It has stood the test of judicial criticism for more than *eighty years*, and has been referred to with approval, in this court, in more than fifty subsequent cases, and in innumerable cases in the State courts. In a recent case decided in this court, relating to the laws of the state of New York, regulating the charges of warehouse men, the decision in the case of *Munn* v. *Illinois*, 94 U. S., decided in 1877, which had received some support from state tribunals, was held to fall under the protection of the doctrine of "*Stare decisis*," and on that ground, *and on that ground alone*, the decision of the court in the Munn case was supported and applied. The decision in the Munn case is fifteen years old and, to say the least of it, is of questionable propriety. The rule of *stare decisis* may, therefore, well be invoked in behalf of the case of *Fletcher* v. *Peck*, which has never been questioned as to its propriety by either court or counsel, so far as I am advised. *That case*, the opinion in which was by Chief Justice Marshall, *is a complete and unanswerable refutation of the claims of the state and of the city, as to the operation and effect of the repealing act of 1873*, and of the decree of the Circuit court in that behalf. Parts of the syllabus of the case read as follows:

"If a legislature make a grant of lands in fee simple,
"a subsequent legislature cannot take away the title of
"the *bona fide* purchaser for a valuable consideration from
"the first grantor upon the ground that the grant to the
"latter was fraudulent.

"When a law is a contract, the repeal of that law can-
"not take away rights vested under that contract.

"A grant made in pursuance of a contract is an exe-

"cuted contract, and its obligation cannot be impaired by "a law of a state.

"A grant implies a contract by the grantor not to re- "assert the title granted."

Chief Justice MARSHALL, at page 128, says: "That the "legislature of Georgia, unless restrained by its own "constitution, possesses the power of disposing of the unap- "propriated lands within its own limits, in such manner "as its own judgment may dictate, is a proposition *not to* "*be controverted.*"

At page 132, he further says: "The legislature of "Georgia was a party to this transaction, and for a party "to pronounce its own deed invalid, *whatever cause may* "*be assigned for its invalidity*, must be considered a "mere act of power, which must find its vindication in "a train of reasoning not often heard in courts of jus- "tice."

At page 137, he further says: "The contract be- "tween Georgia and the purchaser WAS EXECUTED BY "THE GRANT. *A contract executed, as well as one which* "*is executory, contains obligations binding upon the par-* "*ties. A grant, in its own nature, amounts to an ex-* "*tinguishment of the right of the grantor, and im-* "*plies a contract not to reassert that right.* A PARTY "IS, THEREFORE, ALWAYS ESTOPPED BY HIS OWN "GRANT."

While it is indisputably manifest that the present is a real and *bona fide* litigation, and the eminent ability of counsel employed on behalf of the state and city, would negative any suspicion to the contrary, still I cannot quite forego a quotation from the separate opinion of Mr. Justice JOHNSON in the case of *Fletcher* v. *Peck*. He says, pages 147-8:

"I have been very unwilling to proceed to the decision "of this cause at all. It appears to me to bear strong "evidence upon the face of it of being a mere feigned "case. It is our duty to decide on the rights, *but not on* "*the speculations of parties.* My confidence, however, "in the respectable gentlemen who have been engaged "for the parties, has induced me to abandon my scruples, 'in the belief that they never would consent to impose a "mere feigned case upon this court."

Many more cases are referred to, bearing upon the same question, in the brief and argument of the general counsel for the railroad company, which it would be a waste of time and labor for me to reproduce. The result of all these cases is and must be, that, if the act of 1869 was valid, as the decree of the Circuit court admits, and the grants, contained in that act, took effect as to the Illinois Central Railroad Company, either by virtue of the act itself or by acceptance of it and possession under it, THE REPEALING ACT OF 1873, AS TO RIGHTS SO VESTED, WAS AN ABSOLUTE NULLITY. Stability of rights demands this conclusion. The principle of repudiation cannot be adopted, *in any case*, without seriously imperiling every private interest of the country. The changing influences of political life need some steadying force. I am at a loss for the location of that force, if it may not be found in the courts. That which is purely political, is certainly of the most vacillating and uncertain character; and it is without check or restraint, except as the courts apply the obstructions carefully provided for by our constitutions.

IX.

The city of Chicago has appealed from the decree of the Circuit court; but the printed record does not show any assignment of errors in its behalf. Inasmuch as the city of Chicago is not responsible for anything in respect to the harbor of Chicago, which it does not absolutely meddle with, this negative attitude of the city upon its own appeal is explained. The city of Chicago, through its city council, could not demand more from a court, than the decree allows. Its attitude is an attitude of defense.

It would, perhaps, assume an attitude of aggression, if the shekels of prevention were in sight—and in saying this, there is no reflection intended upon the honorable counsel, who represent the city.

The obligations of the city, in respect to the Harbor, and which have appropriate bearing upon its rights, are well illustrated by the case of *Goodrich et al.* v. *City of Chicago*, 20 Ill., 445. A steamer of the Goodrich line had been damaged by contact with the wreck of a vessel in the Chicago harbor, and action was brought against the city to recover the damage. It might well be supposed, perhaps, that the result of such an action, if the pretensions of the city and the decree of the Circuit court can be sustained, would be a judgment against the city for the full amount of the damage. It might be a disappointment to a professional judgment, that such a result was not reached; but the opinion of the Supreme court of Illinois by C. J. CATON (pp. 447–8) holds, that the city of Chicago *was not bound to exercise the power* that it had by its charter over the harbor, and would be responsible for damages resulting from the condition of the

harbor, *only* in case it undertook the execution of the power, and was guilty of negligence in its execution.

It may be fairly said, that by the decree of the Circuit court, the city of Chicago has received an unjust and undeserved advantage, an advantage only valuable as a *merchantable* commodity, without benefit to itself or its citizens. It has secured it, also, at the expense of principles, which underlie the interpretation of contracts and acts of legislation.

X.

The State of Illinois, has assigned upon the Record a single error, viz:

"The court erred in sustaining the validity of the "act of the general assembly of the State of Illinois, en- "titled, 'An act in relation to a portion of the submerged "lands and Lake Park grounds lying on and adjacent to "the shore of Lake Michigan, on the eastern frontage of "the city of Chicago,' in force April 16, 1869, and in "confirming the title of the Illinois Central Railroad "Company to the portion of said submerged lands "reclaimed by said company prior to the repeal of said "act."

For a full and sufficient answer to this assignment of error, reference is made to what I have already said, but, more especially, to the brief and argument of my associate.

There is one thing more which I wish to suggest to the court. I have been concerned professionally, in the litigations relating to the act of 1869, and the outer harbor of Chicago, since the month of August, 1869, more than twenty-three years. This is a large part of a lawyer's

professional life. In the meantime, the developments of the State of Illinois, and of the city of Chicago, have been going on; but the developments of the *outer harbor* of Chicago have made no progress, except as the Illinois Central Railroad Company has been the instrument of doing it.

It might be retorted upon me, in view of some of the statements I have made, that the state and the city of Chicago had been held in check *in their benevolent and public purposes*, by the claims of the railroad company under its charter and the act of 1869. The sufficient answer to such a suggestion, if it should be made, would be, that the whole executive and police power of the state is, at all times, available to the state for the protection of its proprietary rights, and the safety of its citizens, and further and beyond all this reserved force of the state, it may be said, that the Illinois Central Railroad Company, whilst consistently asserting its rights, has never attempted to vindicate them by any physical resistance to what might be considered a *public authority*.

The case, as presented by the record, is as full and complete in its facts, as any case, relating to the subject-matter of it, can ever be made, and all the questions involved are now brought to a hearing, and before a court, whose judgment must be regarded as final. It is respectfully submitted, that the decree of the Circuit court, as to all those parts of it, to which exceptions are taken by the Illinois Central Railroad Company should be reversed, and that, in all other respects, it should be affirmed.

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Of Counsel for Illinois Central Railroad Company.

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JAMES H.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1892.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
AND THE CITY OF CHICAGO,
Appellees.

BRIEF FOR APPELLANT.

BENJAMIN F. AYER,
OF COUNSEL FOR APPELLANT.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1892.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS AND THE CITY OF CHICAGO,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF THE CASE.

This suit was commenced by an information or bill in equity filed by the Attorney General, in the name of the People of the State of Illinois, March 1, 1883, in the Circuit Court of Cook County, Illinois, against the Illinois Central Railroad Company and the City of Chicago. The United States was also named as a party defendant, but did not enter an appearance. No case was stated in the information, nor was any relief asked, against the City of Chicago. The only grievances complained of were the alleged acts and pretensions of the Illinois Central Railroad Company. (Rec., 3–15.)

The Railroad Company filed its answer in the State court at the first term after the commencement of the suit (Rec., 17–34), and also its petition and bond for the removal of the cause into the Circuit Court of the United States for the North-

ern District of Illinois. (Rec., 34–38.) The reason assigned for the removal was that it was a suit arising under the Constitution of the United States, within the meaning of those words as used in the second section of the Act of Congress of March 3, 1875, then in force, entitled "An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of cases from the State courts, and for other purposes."

A transcript of the record was filed in the United States Circuit Court May 7, 1883 (Rec., 1); and on the 22d of the same month the City of Chicago appeared and filed its answer in that court, admitting all the allegations of fact contained in the information. (Rec., 39–41.)

A motion was made subsequently by the complainants' solicitor to remand the cause to the State court, but the motion was overruled (Rec., 41) on grounds mentioned in the opinion of Mr. Justice Harlan in *State of Illinois* v. *Illinois Central R. Co.*, 16 Fed. Rep., 881.

The pleadings afterwards underwent various alterations. An amended information was filed by the Attorney General, March 6, 1886, (Rec., 46–67), to which answers were filed by the Railroad Company and the city. (Rec., 69–95, 97–100.)

Amendments to the answer of the city, and a cross-bill by the city, were filed June 20, 1887. (Rec., 104–108, 108–117.) On the 21st of June 1887, leave was given the Attorney General to file amendments to the amended information, subject to the further judgment of the court as to the propriety of the same to be determined at the hearing; and the city of Chicago was permitted, subject to the same reservation, to file amendments to its answer and a cross-bill. The defendants were allowed to file answers to the information as amended and to the cross-bill within ten days, if they should desire to do so; and if no further answer should be made to the amended information, it was ordered that those already filed should be treated as answers to the same and all amendments thereof. (Rec., 117.) On the same day, a second amended information was filed by the Attorney General, (Rec., 121–143); and June 29, 1887, answers were filed by him and by the Railroad Company to the cross-bill. (Rec., 144–150, 151–163.) Replications were filed by the Attorney General on the same day to

the answers of the City of Chicago and the Railroad Company, (Rec., 164, 165); and on the next day an amendment was made to the answer of the Railroad Company to the amended information. (Rec., 166.) This amendment consists of a single clause to be inserted in the last paragraph on page 87 of the printed record, next after the word "insists" in the first line.

The avowed object of the suit is to settle by judicial decree the title to certain lands in Chicago, situated on the border of Lake Michigan between the mouth of the Chicago river and Sixteenth street, which have been reclaimed from the lake by the Illinois Central Railroad Company and occupied by it for many years for railroad purposes, and also the title to the submerged lands immediately adjacent to that part of the lake shore.

It is necessary to a clear understanding of the questions involved, that a general outline should be given of the essential facts and circumstances relating to the incorporation of the Railroad Company, the location of its railroad within the city of Chicago, and the rights acquired by the Company to the lands in controversy.

By an Act of Congress, approved September 20, 1850 (9 U. S. Statutes at Large, 466), the right of way not exceeding 200 feet in width through the public lands was granted to the State of Illinois, for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal in that State (at LaSalle) to Cairo, at the confluence of the Ohio and Mississippi rivers, with a branch from that line to Chicago, and another, *via* the city of Galena, to Dubuque, in the State of Iowa. A grant of public lands was also made to the State to aid in the construction of the railroad and branches, which, by the terms of the Act, were to "be and remain a public highway for the use of the Government of the United States free from toll or other charge upon the transportation of any property or troops of the United States." It was also provided that the United States mail should at all times be transported on the said railroad under the direction of the Post Office Department at such price as the Congress may by law direct.

This Act of Congress was formally accepted by the legisla-

ture of the State February 17, 1851 (Laws 1851, 192–3). Seven days before the acceptance—February 10, 1851—the Illinois Central Railroad Company was incorporated for the purpose of constructing, maintaining and operating the railroad and branches contemplated in the Act of Congress. (Rec., 611-623.)

By the second section of its charter, the Company was authorized and empowered "to survey, locate, construct, complete, alter, maintain and operate a railroad with one or more "tracks or lines of rails, from the southern terminus of the "Illinois and Michigan Canal to a point at the city of Cairo, "with a branch of the same to the city of Chicago on Lake "Michigan, and also a branch *via* the city of Galena to a point "on the Mississippi river opposite the town of Dubuque in the "State of Iowa."

It is provided in the third section, that "the said corporation "shall have right of way upon, and may appropriate to its sole "use and control for the purposes contemplated herein, land "not exceeding two hundred feet in width through its entire "length; may enter upon and take possession of and use all "and singular any lands, streams and materials of every kind, "for the location of depots and stopping stages, for the purpose "of constructing bridges, dams, embankments, excavations, "station-grounds, spoil banks, turnouts, engine-houses, shops "and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation "of said road. *All such lands, waters, materials and privileges "belonging to the State, are hereby granted to said corporation "for said purposes;* but when owned or belonging to any person, company or corporation, and cannot be obtained by "voluntary grant or release, the same may be taken and paid "for, if any damages are awarded, in the manner provided in "'An Act to provide for a general system of railroad incorporations' approved November 5, 1849; *and the final decision "or award shall vest in the corporation hereby created all the "rights, franchises and immunities in said Act contemplated and "provided.*"

The eighth section has the following provision: "Nothing "in this Act contained shall authorize said corporation to make "a location of their track within any city without the consent "of the common council of said city."

By the fifteenth section, the right of way and all the lands granted to the State by the Act of Congress before mentioned, and also the right of way over and through lands owned by the State, were ceded and granted to the corporation, for the "purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches." There was a requirement in this section (clause 3) that the railroad should be built *into* the city of Chicago.

By the eighteenth section, the Company is required, in consideration of the grants, privileges and franchises conferred, to pay into the treasury of the State, on the first Monday of December and June of each year, five per centum of the gross receipts of the road and branches for the six months then next preceding.

The twenty-second section provides for the assessment of an annual tax for State purposes upon all the property and assets of the corporation; and if this tax and the five per cent. charge upon the gross receipts shall not amount to seven per cent. of the total proceeds, receipts or income of the Company, it is required to pay the difference into the State treasury, "so as to make the whole amount paid equal at least to seven per cent. of the gross receipts of said corporation." Exemption is granted in this section from "all taxation of every kind, except as herein provided for."

The Act of November 5, 1849, referred to in the third section of the charter, provides a mode for condemning land required for railroad uses, and contains an express provision that upon the entry of judgment, the corporation "shall become seized in fee of all the lands and real estate described during the continuance of the corporation." (2 Laws 1849, 27.)

The consent of the common council to the location of the railroad within the city of Chicago was given by an ordinance passed June 14, 1852. (Rec., 624–629.) The ordinance provided (Sec. 1), that the railroad (with one or more tracks) should enter the city "at or near the intersection of its south-"ern boundary with Lake Michigan, and, following the shore "on or near the margin of said lake northerly to the southern "bounds of the open space known as Lake Park, in front of "canal section 15, continue northerly across the open space in "front of said section 15 to such grounds as the Company may "acquire between the north line of Randolph street and the

"Chicago river, upon which said grounds shall be located the "depot of said railroad within the city, and such other build- "ings, slips or apparatus as may be necessary and convenient "for the business of said company."

The ordinance also contained the following additional provisions:

"SEC. 2. That said Company may enter upon and use in "perpetuity for its said line of road and other works neces- "sary to protect the same from the lake, a width of 300 feet "from the southern boundary of said public ground near "Twelfth street to the northern line of Randolph street; the "inner or west line of the ground to be used by said Company "to be not less than 400 feet east from the west line of Mich- "igan avenue and parallel thereto.

"SEC. 3. The said Company may extend their works and "fill out into the lake to a point in the southern pier not less "than 400 feet west from the present east end of the same; "thence parallel with Michigan avenue to the north line of "Randolph street extended; but it is expressly understood "that the common council does not grant any right or privi- "lege beyond the limits above specified, nor beyond the line "that may be actually occupied by the works of said Com- "pany. It is further expressly understood that should any "damage or obstruction occur to the harbor of Chicago, "clearly traceable to the construction of said works contem- "plated by sections two and three hereof, then the said Com- "pany shall be held responsible for the same."

"SEC. 7. The said Company shall erect and complete, "within three years after they shall have accepted this ordi- "nance, and shall forever thereafter maintain a continuous wall "or structure of stone masonry, pier work or other sufficient "material, of regular and sightly appearance, and not to exceed "in height the general level of Michigan avenue opposite "thereto, from the north side of Randolph street to the south- "ern boundary of Lake Park before mentioned, at a distance "of not more than 300 feet east from and parallel with "the western or inner line pointed out for said Company, as "specified in section two hereof, and shall continue said works "to the southern boundary of the city, at such distance out- "side of the track of said road as may be expedient, which "structure shall be of sufficient strength and magnitude to pro-

"tect the entire front of said city, between the north line "of Randolph street and its southern boundary from further "damage or injury from the action of the waters of Lake "Michigan, and that part of the structure south of Lake Park "shall be commenced and prosecuted with all reasonable dis- "patch after the acceptance of this ordinance.

"SEC. 9. The said Company shall erect no buildings be- "tween the north line of Randolph street and the south line of "the said Lake Park, nor occupy nor use the works proposed "to be constructed between these points, except for the pas- "sage of, or for making up or distributing their trains; nor "place upon any part of their works between said points, any "obstruction to the view of the lake from the shore, nor suffer "their locomotives, cars or other articles to remain upon their "tracks, but only erect such works as are proper for the con- "struction of their necessary tracks and protection of the "same."

"SEC. 12. Upon the acceptance of this ordinance by the "said Company (which shall be within ninety days of the pass- "ing of the same) a contract or agreement embodying the "provisions herein contained, and stipulating that the permis- "sion, rights and privileges hereby conferred upon said Com- "pany shall depend upon the performance on their part of the "requirements made upon them by this ordinance, shall be "executed, sealed and delivered on the part of the City of "Chicago, by the mayor thereof, and on the part of the Illi- "nois Central Railroad Company, by the president thereof, "both in usual legal form."

The ordinance was accepted by the Railroad Company September 2, 1852; and a contract under seal between the Company and the city in accordance therewith was executed March 28, 1853. (Rec., 623–631.)

A map of Chicago, published by Rees and Rucker in 1849 will be found in the Record, which, it is proved, represents with substantial accuracy the shore line and the land bordering upon the lake between the river and the southern boundary of the city (then Twenty-second street) just before the railroad was located. (Rec., 284, 285, 286, *1,194*.) Another map published by Henry Hart in 1853, also to be found in the Record, shows the situation the year after the road was located. (Rec., 284, 286, *1,195*.)

The ground designated as Lake Park in the ordinance of June 14, 1852, is represented upon the Rees and Rucker map as a part of Michigan avenue. Upon the Hart map it is represented in the same way, but the words "Lake Park" are also inscribed in the south-east corner. This park (including the avenue) consisted, in 1852, of a narrow strip of ground on the border of the lake extending from Randolph street to Park Row (Block 23). The length of the strip was about a mile and one-eighth, and it varied in width from ninety to four hundred feet. (Rec., 282–3.)

The evidence shows that for several years preceding the passage of the ordinance the waters of the lake had been constantly wearing away this part of the shore. This process of erosion was apparently caused by the construction of the piers by the Government at the mouth of the river at some time prior to 1835, and it appears to have been greatly accelerated by the extension of the piers a year or two later. Attempts were made from time to time by the property-owners on Michigan avenue and by the city to protect the shore from further invasion by the lake, but their efforts proved ineffectual. When the railroad was located in 1852, more than half the land which in 1835 was included within the limits of the park and avenue had been worn away. At that time the lake had so far advanced upon the shore, that from Randolph street to Jackson street only a narrow margin of land from ninety to one hundred and twelve feet wide was left between the west line of the avenue and the lake, and serious apprehensions were felt by the mayor of the city and other residents on Michigan avenue for the safety of their property. At the south end, the width of the park and avenue had been diminished since 1836 from six or seven hundred feet to four hundred. (Rec., testimony of R B. Mason, 282–284; J. Y. Scammon, 232–258, 285–296, 441–449.)

The waters of the lake had wrought similar effects during the same period upon the shore south of Park Row, between Twelfth street and Eighteenth street. In 1840, the dry land along this part of the shore extended into the lake beyond the present works of the Railroad Company. Many acres were carried away by abrasion between 1835 and 1852. (Rec., Testimony of J. Y. Scammon, 289–291; C. C. P. Holden, 469–483.)

The strip of ground designated in the ordinance for the lo-

cation and construction of the railroad between the southern boundary of Lake Park and the north line of Randolph street, was 300 feet wide, the west line of the strip being 400 feet east of the west line of Michigan avenue and parallel thereto. The entire strip was covered by the waters of the lake. The railroad was located and built as prescribed by the ordinance. The tracks were laid upon a pile-bridge, and the depth of water along the line of piling varied from two and a half to nine feet. An exterior breakwater to protect the company's works and the shore was built outside the tracks on a line parallel with and about 600 feet east of the west line of Michigan avenue; and a similar protection was erected south of Park Row, at a convenient distance east of the tracks, to a point far beyond the southern boundary of the city. The space between the breakwater and the inner or west line of the railroad, north of Park Row, was afterwards filled with earth by the Railroad Company. This work was done gradually, and the filling was not completed until after the great fire in Chicago of 1871. (Rec., testimony of R. B. Mason, 282–284; J. Y. Scammon, 252; L. P. Morehouse, 352, 361, 363.)

From 1852 to 1871, and later, a considerable area between Park Row and Randolph street, west of the railroad, remained covered by water. This space has since been filled with earth. Michigan avenue, as now laid out and improved, is ninety feet wide, and the public ground between it and the railroad, except for a short distance at the north end, has a uniform width of 310 feet. The Hart map, published in 1853, shows the location of the railroad in the open waters of the lake, and the body of water which lay between it and the shore. Two lithographic views of Michigan avenue, one made in 1860 and the other in 1863, which were put in evidence, are proved to be substantially accurate representations of the lake shore as it was when they were published. (Rec., 284, 288, 290, *1,197*, *1,198*.)

When the ordinance of 1852 was passed, the City of Chicago was incorporated under a special charter approved February 14, 1851. Its eastern boundary was the lake; but police jurisdiction was vested in the common council over the harbor, which by the terms of the charter included "the piers and so much of Lake Michigan as lies within the distance of one mile into the lake, and the Chicago river and its branches to their respective sources." (Rec., 540–542.)

By an amendment to the charter approved February 28, 1854, the corporate limits were extended, so as to "include so much of the waters and bed of the lake as lie within one mile of the shore thereof and east of the (then) present boundaries of the city." (Rec., 543–4.)

It is not pretended that the State has ever made a direct grant to the city of any part of the bed of Lake Michigan. But the city claims to have been in 1852, and since, the legal owner of the public ground on the shore of the lake between Randolph street and Park Row. The origin, history and nature of this title may be as conveniently explained here as at any other point in the statement.

That part of the public ground lying south of the center line of Madison street extended is embraced within a local subdivision known as "Fractional Section Fifteen Addition to Chicago." The remainder lies within "Fort Dearborn Addition to Chicago."

FRACTIONAL SECTION FIFTEEN ADDITION. It is alleged in the information and admitted in the answers, that fractional section fifteen was one of the tracts of public land granted to the State by an Act of Congress approved March 2, 1827, for the purpose of aiding the State in opening a canal to unite the waters of the Illinois river with those of Lake Michigan. All the granted lands were declared to be "subject to the disposal of the legislature of the State for the purpose aforesaid and no other"; and express provision was made in the Act that the State under the authority of its legislature should "have power to sell and convey the whole or any part of the said land, and to give a title in fee simple therefor to whomsoever shall purchase the whole or any part thereof." (Rec., 580.) There was a proviso that the canal should be commenced within five years and completed within twenty years from the passage of the Act; but by an amendatory Act approved March 2, 1833, the time for commencing and completing the canal was extended five years. (Rec, 648.)

The canal was completed and open for navigation in 1848 (Rec., 507), and has been ever since in use during the season of navigation.

By an Act of the legislature, approved January 22, 1829, a board of canal commissioners was created, to locate the

canal and to commence and construct the work. (Rec., 580–583.)

By a subsequent Act, approved January 9, 1836, a new board was created consisting of three commissioners, who were put in charge of the canal and canal property. These commissioners were State officers, and the board continued in existence until 1843. By this Act the commissioners were directed to "cause the canal lands in or near Chicago, suitable therefor, to be laid off into town lots," and to proceed on the 20th day of June then next to sell the lots in fractional section fifteen, adjoining the town of Chicago, "it being first laid off and subdivided into town lots, streets and alleys, as in their best judgment will best promote the interest of the said canal fund." (Rec., 592, Secs. XXXII and XXXIII.)

In April 1836, the canal commissioners caused a map to be made upon which fractional section fifteen is subdivided into town lots and streets. (Rec., 235–6, *1,191.*) The map is styled "Map of Fractional Section No. Fifteen, Township 39 North, Range 14 East of the 3rd Principal Meridian. Surveyed and subdivided by the board of Canal Commissioners, pursuant to law, in the month of April, A. D. 1836." It shows upon its face that the subdivision embraces the whole fractional section. The tract is bounded, by the map, on the north by Madison street, west by State street, south by Twelfth street, and east by Lake Michigan. In front of the easterly tier of lots a street of irregular width, bordering upon the lake, except for the distance of 200 feet at the south end, is delineated on the map and marked "Michigan Avenue." The map is certified by the canal commissioners under date of June 13, 1836, and appears to have been acknowledged by them before a justice of the Supreme Court June 10, 1836. It is also certified by one Edward B. Talcott, who describes himself as "Assistant Engineer in the employment of Commissioners of Illinois and Michigan Canal," under date of June 13, 1836, and was filed for record in the county recorder's office July 20, 1836.

A statute of Illinois (approved February 27, 1833) was then in force providing for the recording of town plats, by which it was enacted, that whenever any county commissioners or other persons wished to lay out a town, or an addition or subdivision of outlots, they should cause the same to be surveyed and a plat or map thereof to be made by the county

surveyor, which should "particularly describe and set forth all "the streets, alleys, commons or public grounds, and all in and "out lots or fractional lots, within, adjoining or adjacent to said "town, giving the names, widths, corners, boundaries and extent "of all such streets and alleys." The statute required that the map should be certified by the surveyor and acknowledged by the county commissioners or other persons making the subdivision before a justice of the supreme court, a justice of a circuit court, or a justice of the peace in the county in which the land lay, whose certificate of acknowledgment should be endorsed on the map; and that the map with the certificates of the surveyor and of acknowledgment should be recorded. It was further provided that every donation or grant to the public, or any individual, religious society, or corporation, marked or noted as such on the map or plat, "when made out, certified, acknowledged and recorded as required by this act," should "be deemed in law and in equity a sufficient conveyance to "vest the fee simple title of all such parcel or parcels of land as "are therein expressed, and shall be considered to all intents "and purposes as a general warranty against such donor or "donors, their heirs and representatives, to the said donee or "donees, grantee or grantees, for his, her or their use, for the "uses and purposes therein named, expressed or intended, and "for no other use or purpose whatever. And the land intended "to be for streets, alleys, ways, commons, or other public uses, "in any town or city, or addition thereto, shall be held in the "corporate name thereof, in trust to and for the uses and pur- "poses set forth, and expressed or intended." (Rev. Stat. 1833, 599; Rec., 533-4.)

The original town of Chicago was laid out by the canal commissioners August 4, 1830 (Rec., 334), and upon the organization of Cook County, January 15, 1831, was made the county seat. (Laws 1831, 54.) The town was afterwards incorporated by an Act of the legislature approved February 11, 1835, with boundaries which included fractional sections ten and fifteen in township thirty-nine north, range fourteen east of the third principal meridian; but the authority of the board of trustees was not to be extended over the south fraction of section ten until the same should cease to be occupied by the United States. (Rec., 334-5; Laws 1835, 204.)

It is alleged in the information and cross-bill and admitted in the answers to both, that all the town lots in Fractional

Section Fifteen Addition were sold by the canal commissioners as laid out on the plat (Rec., 127, 78, 99, 111, 146, 154); and it is proved that they were sold at public sale and with reference to the plat. The lots on Michigan avenue were sold for two or three, or perhaps four times as much as the other lots, because they fronted upon the lake and that wide street. (Rec., 248, 443.)

By an Act of the legislature approved February 21, 1843, the Governor of the State was authorized to negotiate a loan for the completion of the canal, on the pledge of the canal and all remaining lands and lots belonging to the canal fund. The Act provided for the appointment of a board of trustees, who should possess all the powers and perform all the duties previously conferred upon the board of canal commissioners. To secure the payment of the loan a grant was made to the board of trustees by the tenth section in the following terms: "The State does hereby irrevocably grant to the said board "of trustees of the Illinois and Michigan Canal the bed of the "said Illinois and Michigan Canal, and the land over which "the same passes, . . . and also *all the remaining lands* "*and lots belonging to the said canal fund*, or which hereafter "may be given, granted or donated by the General Govern- "ment to the State to aid in the construction of the said canal, "and the buildings and erections belonging to the State "thereon situated; said board of trustees to have, hold, pos- "sess and enjoy the same as fully and as absolutely in all "respects as the State now can or hereafter could do, for the "uses, purposes and trusts hereinafter mentioned; but it is to "be understood that all canal lands and lots heretofore sold by "the board of commissioners upon which moneys are now due "or may hereafter become due, whether the said lands and "lots be now forfeited or relinquished, or hereafter become "forfeited or relinquished, shall be exempt from the aforesaid "provisions of this Act."

The Act then goes on to authorize the board of trustees to take possession of the granted property, and to proceed to complete the canal. Power is conferred upon the trustees to sell the canal lands and apply the proceeds to the payment of the securities held by the subscribers to the loan, and the expenses incident to the execution of the trust. And by the nineteenth section it was provided, that "whenever the trust "created by this Act shall have been fully executed and per-

" formed by the said trustees, the said canal and the canal " property that may then remain shall revert to the State, and " the State hereby reserves the right of paying off the bonds " and certificates to be paid to the said trustees and the inci- " dental expenses paid by them and the interest thereon; and " the said trustees shall then resign the said canal and the re- " maining canal property and assets to the State." (Rec., 599–606.)

By a supplemental Act, approved March 1, 1845, it was provided, that after the completion of the loan the Governor of the State should execute and deliver under the seal of the State a deed to the said trustees of all the property and effects mentioned in the tenth section of the Act of February 21, 1843, " which said conveyance shall include the lands and lots remaining unsold donated by the United States to the State of Illinois, to aid in the completion of the said canal, to be held in trust as in the said Act stipulated." (Rec., 606–7.)

Pursuant to the provisions of the last mentioned Act a deed was made by the Governor to the canal trustees June 26, 1845, in which the Acts of 1843 and 1845 were recited at length, conveying to them and their successors in trust the bed of the canal and the land over which the same passes, with all the hereditaments and appurtenances thereto belonging, " and " all the remaining lands and lots belonging to the canal fund " or which hereafter may be given, granted or donated by the " General Government to the State to aid in the construction " of the said canal, and the buildings and erections belonging " to the State thereon situated; also the lands and lots " remaining unsold donated by the United States to the " State of Illinois to aid in the completion of the said " canal; to have, hold, possess and enjoy the premises afore- " said to them, . . . as trustees of the Illinois and " Michigan Canal as aforesaid, and their successors in trust, " as in the above recited Acts stipulated, and to and for the " uses and purposes in said Acts expressed and intended. And " so to have, hold and enjoy the said property, with the rights " of controlling, managing, selling and disposing of the same, " and subject to all the duties and obligations as they are set " forth in the said Acts of the General Assembly, until from the " proceeds of the said property, and the revenues of the said " canal, after it shall be completed, all the moneys to be paid, " and trusts performed by the said trustees, as specified in the

"said Acts, shall be fully paid, performed, satisfied and ex-"tinguished, together with all just and necessary charges "and expenditures incurred and to be incurred in carrying "on the work and business of the said trust." (Rec., 264, 266.)

The canal debt was extinguished in 1871; and pursuant to an Act of the legislature entitled "An Act to settle up and close the trust of the board of trustees of the Illinois and Michigan Canal," approved April 22d of that year (Rec., 608-9), the board of trustees by deed dated August 19, 1871 released and transferred to the State all the remaining property and assets belonging to the trust. (Rec., 276-7.)

By an Act amendatory of the charter of the City of Chicago, approved February 18, 1861, it was, among other things, provided as follows:

"SEC. 64. No encroachment shall be made upon the land "or water west of a line mentioned in the second section of "an ordinance concerning the Illinois Central railroad (which "line is 'not less than four hundred feet east from the west "line of Michigan Avenue, and parallel thereto'), by any "railroad company; nor shall any cars, locomotives, engines, "machines, or other things belonging to any railroad or trans-"portation company be permitted to occupy the same; nor "shall any cars or machinery be left standing upon said track "fronting any part of Michigan avenue; nor shall the city "council ever allow any encroachments west of the line above "described. And any person, being the owner of or interested "in any lot or part of a lot fronting on Michigan avenue, "shall have the right to enjoin said company, and all other "persons and corporations from any violation of the provisions "of this section or of *said ordinance*, and by bill or petition "in chancery, in his or their own name, or otherwise, *enforce* "*the provisions of said ordinance*, and of this section, and re-"cover such damages for any such encroachment or viola-"tion, as the court shall deem just—the State of Illinois, by "its canal commissioners, having declared that the public "ground east of said lots should forever remain open and "vacant. Neither the common council of the City of Chi-"cago, nor any other authority, shall ever have the power to "permit encroachments thereon, without the consent of all the "persons owning lots or land on said street or avenue." (Priv. Laws 1861, 136; Rec., 544-5.)

On the revision of the city charter in 1863, the same provision was re-enacted, with this amendment: after the words, "nor shall any cars or machinery be left standing upon said track fronting any part of Michigan avenue," the words, "south of Madison street," were inserted. (Priv. Laws 1863, 96; Rec., 547.)

FORT DEARBORN ADDITION TO CHICAGO. That part of the public ground above referred to north of the center line of Madison street extended, is embraced within another local subdivision known as "Fort Dearborn Addition to Chicago." This is a subdivision made in 1839 (the Act of February 27, 1833, providing for the recording of town plats being then still in force), of that part of fractional section 10 in township 39 north, range 14 east of the third principal meridian, which lies on the south side of the Chicago river. A military post called Fort Dearborn was established on this tract of land by the United States in 1804, and was afterwards occupied by the troops of the United States until 1836 or later. On the first of October 1824, the land was formally reserved from sale, for military purposes, by the Commissioner of the General Land Office, upon the written request of the Secretary of War. In 1839, the land being no longer needed for military purposes, the entire tract was subdivided into town lots, streets, alleys and public grounds, by authority of the Secretary of War under the direction of the President of the United States. (Rec., 281.) The map of the subdivision, which has been put in evidence, is styled "Fort Dearborn Addition to Chicago." (Rec., 332, *1200*.) It is certified by the county surveyor, and was acknowledged June 7, 1839, before a justice of the peace, by an agent of the War Department. The certificate of acknowledgment reads as follows:

"STATE OF ILLINOIS, }
"COUNTY OF COOK. }

"Be it remembered that on this seventh day of June in the "year of our Lord one thousand eight hundred and thirty-"nine, before me, Henry Brown, a justice of the peace in and "for said county, came Matthew Birchard, Solicitor of the "General Land Office and agent of the War Department of "the United States, to me personally known, and exhibited a "power of attorney from the Secretary of the Department of "War of the United States, executed officially by said Secre-"tary under the seal of said Department by direction of the

"President of the United States, authorizing him, the said "Matthew Birchard, to cause to be surveyed, platted, duly "acknowledged and recorded as an addition to the town of "Chicago, Illinois, the south-west fractional quarter of Section "10, heretofore reserved for military purposes and the site of "Fort Dearborn, and the same to sell, &c., and acknowledged "the foregoing map to be the map and plat of the Fort Dear-"born Addition to the town of Chicago, and that the United "States of America are the sole proprietors and owners of the "same.

"HENRY BROWN, Justice of the Peace."

The map was filed for record in the recorder's office of the county, June 7, 1839. (Rec., 430.) All the lots in the subdivision were afterwards sold by the Government as shown upon the plat (Rec., 281); but a portion of the property, consisting of block 1, lots 8, 9 and 10, in block 2, lots 1, 2, 3, 5, 6 and 9 in block 4, and lots 1, 2, 3, 4 and 5 in block 5, (including the adjacent streets between them), was reserved from sale until after the decision of the Supreme Court of the United States, at the January term 1849, in the case of the *United States v. the City of Chicago*, 7 How., 185. The reserved lots were then sold and Michigan avenue was extended through to River street. (Rec., 430.)

It will be seen on looking at the plat that Lake Michigan is the eastern boundary of the subdivision. The southern boundary is Madison street. Between Randolph street and Madison street a parcel of ground irregular in shape, lying east of blocks 12 and 15 and between them and the lake, is delineated on the plat, across which are written the words: "Public ground forever to remain vacant of buildings"; and in an explanatory statement written on the margin of the plat and signed by Mr. Birchard as agent and attorney for the Secretary of War there is this declaration: "The public ground between Randolph and Madison streets and fronting upon Lake Michigan, is not to be occupied with buildings of any description."

Mr. Birchard's instructions are set out at length in a decision made by the Hon. Carl Schurz, Secretary of the Interior, February 28, 1879, in a land case before him on appeal from the Commissioner of the General Land Office, which has been put in evidence. (Rec., 338—9.) It appears that Mr. Birchard had express authority to make and record the plat,

and to make sales of the lots, reserving, however, such quantity of land as he might think it necessary to retain for the use of the light-house. The sales made were subsequently confirmed, and the purchasers in due time received their patents for the lots purchased. (Rec. 340.)

The authority of the Secretary of War to cause the property to be sold is not questioned. The Act of Congress, approved March 3, 1819, entitled "An act authorizing the sale of certain military sites," provides as follows:

"That the Secretary of War be, and he is hereby author-
"ized, under the direction of the President of the United States,
"to cause to be sold such military sites belonging to the United
"States as may have been found or become useless for military
"purposes. And the Secretary of War is hereby authorized, on
"the payment of the consideration agreed for into the treasury of
"the United States, to make, execute and deliver all needful in-
"struments, conveying and transferring the same in fee; and the
"jurisdiction which had been specially ceded for military pur-
"poses to the United States over such site or sites shall there-
"after cease." (3 U. S. Stat. at Large, 520; Rec., 551.)

No attempt has ever been made by the United States to disturb the titles to lots in Fort Dearborn Addition, derived through deeds made to purchasers by the Secretary of War. On the contrary, the survey and plat of the subdivision has been recognized as valid by an Act of Congress, in which also certain lands in the subdivision which had been conveyed by the Secretary of War to the Illinois Central Railroad Company, are referred to as "lands granted by the United States." ("Act for the relief of Jean Baptiste Beaubien," approved August 1, 1854. 10 U. S. Stat. at Large, 805; Rec., 550-1.)

The evidence shows that the land marked "Public Ground" on the plat, lying between Randolph and Madison streets, has been devoted to public use since the making and recording of the plat (Rec., 246-7, 269); and that between 1840 and 1852 considerable sums were expended by the city in protecting it from the lake. (Rec., 268-272.) In 1847 an ordinance was passed by the common council providing that the public ground east of Michigan avenue between Randolph street and Park Row should thereafter be known as Lake Park (Rec., 269); and it also appears that between 1866 and

1886 the sum of $174,065.54 was expended by the city for fencing the park and making other improvements thereon. (Rec., 275-6).

When the railroad was located in 1852 nearly all the land contiguous to the lake between Randolph street and the river was owned by private individuals. A small parcel adjacent to the river still belonged to the United States. This parcel, embracing parts of lots 1 to 5, block 5, Fort Dearborn Addition, was purchased by the Railroad Company. The deed executed by the Secretary of War, under date of October 14, 1852, conveying the property to the company "together with all the accretions made or to be made by said lake and river in front of the land hereby conveyed, and all other rights and privileges appertaining to the United States as owners of said land," was put in evidence. (Rec., 300, 430.)

The title to all the remaining lots on the shore between Randolph street and the river was acquired by the Railroad Company at about the same time. (Rec., testimony of J. Y. Scammon, 291--2.) The original deeds conveying the property to the Company were put in evidence, and an abstract of them, by consent of counsel, was made a part of the record. (Rec., 301–308.) These conveyances, it is proved, cover all the lots bordering the lake between Randolph street and the river. (Rec., 428.)

It also appears that the Railroad Company acquired title to all the land on the lake shore between Park Row and Sixteenth street. Part of this land was acquired in the first instance by condemnation, but deeds of the lands condemned were afterwards procured, with the exception of one small parcel. (Rec., 308–331, 429.)

The Railroad Company having purchased all the lots bounded by the lake, between Randolph street and the river, it gradually pushed its works out into the shallow water in front of the lots until they reached the exterior line specified in the third section of the ordinance of June 14, 1852, before referred to, and here the station grounds of the company were located.

By an ordinance passed by the common council of Chicago September 10, 1855, permission was granted to the Railroad Company to curve the tracks leading to its passenger station westwardly of the line fixed by the ordinance of 1852 (a line

400 feet east of the west line of Michigan Avenue), "so as "to cross said line at a point not more than two hundred feet "south of Randolph street, extending and curving said tracks "north-westerly as they approach the depot, and crossing the "north line of Randolph street extended at a point not more "than one hundred feet west of the line fixed by the ordinance "aforesaid." (Rec., 296, 631.)

The ordinance was accepted by the Company, September 11, 1855 (Rec., 633); and the small triangular piece of ground therein described has since been occupied by its tracks. It was needed to obtain convenient access to the passenger station. This appears from the preamble prefixed to the ordinance; also from the testimony. (Rec., testimony of E. T. Jeffery, 369.)

In consideration of the permission thus granted, the Railroad Company was required to lay out upon its own land a street fifty feet wide, west of and alongside its passenger house, extending from Water street to Randolph street. It is proved that this street was laid out and dedicated to public use by the Company in conformity to that requirement. (Rec., testimony of L. P. Morehouse, 348; E. T. Jeffery, 372.)

By a subsequent ordinance, passed September 15, 1856, permission was granted to the Company to enter upon and use in perpetuity an additional piece of ground at the north end and on the east side of the strip three hundred feet wide described in the ordinance of 1852, in order to afford convenient means of approaching and using a part of the station grounds between Randolph street and the river. (Rec., 296, 633-4.) It appears from the recitals in the ordinance that the original strip was too narrow for this purpose; and it is shown by the testimony that the additional area which the Company was thus permitted to occupy is absolutely essential to the convenient operation of its railroad. (Rec., testimony of E. T. Jeffery, 368.)

The two parcels of ground last referred to were covered by water in 1852 when the railroad was laid out (Rec., 283); and it appears from the plat of Fort Dearborn Addition that they were under water in 1839 when that plat was made and recorded. (Rec., 1200.) It is stated in the information that these grounds are used by the Railroad Company "for the "purpose of operating its said railroad within the limits of said "city." (Rec., 135.)

On the 16th of April, 1869, an Act was passed by the Legislature of Illinois, entitled "An Act in relation to a portion of the submerged lands and Lake Park Grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the City of Chicago."

The third section of this Act provides as follows:

"Section 3. The right of the Illinois Central Railroad Com-
"pany, under the grant from the State in its charter, which
"said grant constitutes a part of the consideration for which the
"said company pays to the State at least seven per cent. of its
"gross earnings, and under and by virtue of its appropriation,
"occupancy, use and control, and the riparian ownership
"incident to such grant, appropriation, occupancy, use and
"control in and to the lands submerged or otherwise lying
"east of the said line running parallel with and four
"hundred feet east of the west line of Michigan avenue,
"in fractional sections ten (10) and fifteen (15), township and
"range as aforesaid, is hereby confirmed; and all the right
"and title of the State of Illinois, in and to the submerged
"lands constituting the bed of Lake Michigan, and lying east
"of the tracks and breakwater of the Illinois Central Rail-
"road Company, for the distance of one mile, and between
"the south line of the south pier extended eastwardly and a
"line extended eastward from the south line of lot twenty-one,
"south of and near to the round-house and machine shops of
"said company, in the south division of the said city of Chi-
"cago, are hereby granted, in fee, to the said Illinois Central
"Railroad Company, its successors and assigns: *Provided,*
"*however*, that the fee to said lands shall be held by said com-
"pany in perpetuity, and that the said company shall not have
"power to grant, sell or convey the fee to the same, and that
"all gross receipts from use, profits, leases or otherwise of said
"lands or the improvements thereon, or that may hereafter be
"made thereon, shall form a part of the gross proceeds, re-
"ceipts and income of the said Illinois Central Railroad Com-
"pany upon which said company shall forever pay into the
"state treasury, semi-annually, the per centum provided for in
"its charter, in accordance with the requirements of said
"charter: *And provided, also*, that nothing herein contained
"shall authorize obstructions to the Chicago harbor, or impair
"the public right of navigation, nor shall this Act be construed
"to exempt the Illinois Central Railroad Company, its lessees

"or assigns, from any Act of the general assembly which "may be hereafter passed regulating the rates of wharfage "and dockage to be charged in said harbor: *And provided*, "*further*, that any of the lands hereby granted to the Illinois "Central Railroad Company, and the improvements now or "which may hereafter be on the same, which shall hereafter be "leased by said Illinois Central Railroad Company to any per- "son or corporation, or which may hereafter be occupied by any "person or corporation other than said Illinois Central Rail- "road Company, shall not, during the continuance of such "leasehold estate or of such occupancy, be exempt from mu- "nicipal or other taxation." (Laws 1869, 245-8; Rec., 634–7.)

By this Act, the right of the Railroad Company to all the lands it had appropriated and occupied, lying east of a line drawn parallel to and four hundred feet east of the west line of Michigan avenue in fractional sections ten and fifteen, was confirmed; and a further grant was made to the Company of the submerged lands lying east of its tracks and breakwater within the distance of one mile therefrom, between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one.

The line of the Company's breakwater at that time, and the situation of lot 21, are shown upon one of the maps introduced in evidence, known as the "Morehouse Map," (Rec., 346; 347, *1,201*), a copy of which on a reduced scale is here inserted. The map also gives an accurate representation of the Railroad Company's works along the shore of the lake between the river and Sixteenth street. The Railroad Company or its lessees had possession, at the time of the passage of the Act, of all the land north of Randolph street between the east line of Central avenue and the breakwater indicated by the exterior red line on the map, including the slip and pier there marked "C"; and of all the land below Randolph street, as far south as 16th street, between the breakwater and the west line of the railway. (Rec., 347, 348, 353, 354.)

It will be noticed that the Company had not occupied the whole of the strip 300 feet wide designated for its use by the ordinance of June 14, 1852. From a point about midway between Washington street and Madison street to Park Row, the east 100 feet of the strip was outside the breakwater.

There were two further grants made by the State in the Act of April 16, 1869: One to the City of Chicago, of all the

right, title and interest of the State in and to that part of the public ground between Michigan avenue and the railroad which lies between Park Row and the south line of Monroe street; the other to the Illinois Central, Chicago, Burlington and Quincy, and Michigan Central Railroad Companies, jointly, of all the right and title of the State in and to that part of the public ground east of Michigan avenue lying between the south line of Monroe street and the south line of Randolph street, for the erection thereon of a passenger depot. In consideration of the latter grant the three railroad companies were required to pay $800,000 to the City of Chicago—$200,000 within three months from the passage of the Act, and three similar installments within six, nine and twelve months from the same date. The common council was empowered to quitclaim and release to those companies any claim the city might have on the land by reason of any expenditures and improvements made thereon, or otherwise, and in case of neglect or refusal to make such quitclaim and release within four months from the passage of the Act the grantees were to be discharged from all obligation to pay the balance of the $800,000 then remaining unpaid.

No question arises in this case in respect of either of the grants last mentioned. They have, therefore, at most, only a remote, incidental bearing upon the matters here in controversy. Proof has been made, however, of the fact, that the three railroad companies interested in the grant made of the land north of Monroe street tendered the first installment of the $800,000 they were required to pay the city, to the city comptroller on the 12th day of July, 1869. The comptroller accepted the money and reported the payment to the common council, stating in his report that, as he had received no instructions from the council on the subject, he had taken the money upon the condition that no rights of the city should be thereby waived or its interests in any manner prejudiced. It was further stated in his report, that he had not placed the money in the city treasury, but in a bank on special deposit, and that he awaited the direction and action of the council in the premises. The comptroller's communication was referred to a committee, and no definite action was taken by the council on the subject until June 13, 1870, when a resolution was passed that the city would not recognize the act of the comptroller in receiving the money as binding upon the city, nor "receive any money from the railroad corporations under said

"Act of the General Assembly until forced to do so by the "courts:" No conveyance or release was made by the city to the three railroad companies, or either of them, of its interest in the property; and no further tender of money was made by the railroad companies to the city. The comptroller, at the expiration of his term of office, did not turn over the $200,000 to his successor, but kept it deposited in a bank to his own individual credit until 1874, or later, when on the application of the railroad companies the money was returned to them. (Rec., 522–532.)

The grants made to the Illinois Central Railroad Company by the Act of April 16, 1869, were formally accepted by the Company on the 6th day of July, 1870. At a meeting of its board of directors held on that day in the City of New York, the following resolution was unanimously adopted:

"*Resolved*, That this company accepts the grants under the "Act of the Legislature of Illinois at its last session, and that "the president give notice thereof to the State, and that the "company has commenced work upon the shore of the lake "at Chicago, under the grants referred to."

On the 17th of November 1870, the following letter was sent by the president of the company to the Secretary of State:

"CHICAGO, November 17, 1870.

"*Hon. Edward Rummel, Secretary of the State of Illinois,*
"*Springfield, Illinois.*

"SIR: At a meeting of the board of directors of the Illinois "Central Railroad Company held at the company's office in "New York the 6th day of July 1870, it was resolved that "this company accepts the grants under the Act of the Legis-"lature of Illinois at its last session, and that the president give "notice thereof to the State, and that the company has com-"menced work upon the shore of the lake at Chicago under "the grants referred to.

"In accordance with the above resolution I hereby give you "notice that this company accepts the grants above referred "to and more particularly mentioned and described in an Act "in force April 16, A. D. 1869, and entitled 'An Act in "'relation to a portion of the submerged lands and Lake "'Park grounds lying on and adjacent to the shore of Lake "'Michigan, on the eastern frontage of the city of Chicago'.

"I also give you notice that this company has commenced "work on the improvement of said lake shore.

"You will please regard the above as an acceptance by this "company of the above mentioned law, and it is desired by "said company that said acceptance shall remain permanently "on file and of record in your office.

"Please acknowledge receipt hereof, and oblige,

"Yours very truly,

"JOHN M. DOUGLAS,

"*President.*"

The receipt of the letter was acknowledged by the Secretary of State on the 18th of the same month, by an official communication, as follows:

"STATE OF ILLINOIS, SECRETARY'S OFFICE.
SPRINGFIELD, Nov. 18, 1870.

"*Hon. John M. Douglas, Pres. Ill. Central R. R. Co., Chi-*
"*cago, Ill.*

"DEAR SIR: Yours of the 17th inst., being a notice of the "acceptance by the Illinois Central Railroad Company of the "grants under an Act of the legislature of Illinois, in force "April 16, 1869, was this day received and filed, and duly "recorded in the records of this office.

"Very respectfully,

"EDWARD RUMMEL,

"*Secretary of State.*"

At the next annual meeting of the stockholders of the Company, held at Chicago on the 31st of May 1871, the following action was taken:

"The minutes of the meetings of the board of directors "held since the last annual meeting of the shareholders [held "at Chicago on the 25th of May 1870], were submitted, and "the following resolution adopted:

"*Resolved*, That the acts and doings, resolutions and votes "of the board of directors, all and singular, are hereby ratified, "approved and confirmed." (Rec., 297–300, 638.)

The Act of April 16, 1869, was passed before any provision had been made by Congress for the construction of the outer harbor; but by an act of Congress approved July 11, 1870,

an appropriation of $100,000 was made "for enlargement of harbor facilities at Chicago, Illinois, according to the plans of the engineering department, and for a harbor of refuge, $50,000 "—"to be expended under the direction and superintendence of the Secretary of War, according to such plans as shall be by him first selected and approved." (16 U. S. Stat. at Large, 223, 226.)

In May 1869, immediately after the passage of the Act of April 16th of that year, and more than twelve months before the above mentioned appropriation was made by Congress, the Illinois Central Railroad Company caused a plan to be prepared for the construction of piers or wharves in front of its works between the mouth of the river and the north line of lot 21. A series of wharves with intervening slips was contemplated, to be extended into the lake to the distance of 2420 feet from the line of the shore between Madison street and Park Row. The wharves were intended to be 600 feet wide, and the slips between them 150 feet. The plan also embraced the construction of a breakwater in front of the wharves, at a distance beyond them of 400 feet. The drawing made at the time showing the general plan of the proposed wharves has been put in evidence (Record, 350, 1202). The probable cost of the whole work is estimated at about $6,500,000. (Rec., 440-1.)

The plan, as a whole, did not meet with the approval of the Government, and in consequence of its action only a comparatively small part of the plan was carried into execution. (Rec., 350–1.) Work was commenced upon one of the proposed wharves adjacent to the river, early in the autumn of 1869 apparently, but the work was interrupted on the 3rd of July 1871 by an injunction granted by the circuit court of the United States, upon an information filed by the United States attorney for the Northern District of Illinois. The substantial ground of complaint was, that an appropriation had been made by Congress and plans had been prepared by the engineering department of the United States for the construction of an outer harbor, and that the works contemplated by the Railroad Company would interfere with those plans and obstruct navigation. (Rec., 299, 638 – 640.) A preliminary injunction was granted, but the suit never came to a final hearing.

On the 3d of August 1871 a board of engineer officers ap-

pointed by the Secretary of War was directed to assemble in Chicago on the 6th of that month or as soon thereafter as practicable, to "take into consideration the plans submitted by "the Illinois Central Railroad Company for docks or wharves "in the basin now (then) being formed by the construction of "the United States breakwater, to report their views thereon, "and to establish the limiting lines for such constructions in "that basin, reference being had to the interests of commerce "and navigation." (Rec., 642 – 3.)

The report of the board was transmitted to the Secretary September 29, 1871, in which it was recommended that a line be established in the harbor beyond which no wharves or other structures should extend. The limit suggested by the board was a line parallel to the Government breakwater, 1,200 feet west of it on the north side of Randolph street, and 2,000 feet west of it on the south side of that street.

The plan of wharves submitted by the Illinois Central Railroad Company was deemed in part objectionable, because the wharves proposed to be built south of Randolph street were designed to extend 800 feet beyond the limit recommended, and also because the spaces between the slips were too wide—the room for vessels being thereby unnecessarily diminished. The board was also of opinion that, as the question of ownership of the land on the shore south of Randolph steet was in dispute, no piers should be allowed to be built there until the controversy should be settled. North of Randolph street there was no dispute as to the ownership of the Illinois Central Railroad Company, nor any opposition to building wharves there; but south of that street there were strong objections on the part of the city authorities and others whose interests were affected. So much of the plan submitted by the Railroad Company as related to wharves north of Randolph street was approved; but the board recommended that the construction of wharves south of Randolph street should not be authorized until all questions of right along the lake shore had been disposed of, nor until the plans for them should be approved by the Secretary of War. (Rec., 642–646.)

The report was approved by the Secretary of War October 4, 1871 (Rec., 642), and on the 16th of January 1872 an agreement was made for the dismissal or suspension of the suit which had been commenced by the United States district

attorney in July previous. On that day a stipulation was filed setting forth that the matters presented in the information relating to the construction of docks and wharves in the outer harbor, formed by the breakwater then in process of erection by the Government of the United States, had been referred to the War Department, and had been considered and reported upon by engineer officers appointed by the Secretary of War for that purpose; that the harbor lines limiting the construction of docks and wharves in said outer harbor, as recommended by the engineer officers, had been approved by the Secretary of War, and the lines so established fixed as the lines to which docks and wharves might be extended by parties entitled to construct them. The stipulation then concludes as follows:

"And the said defendant being desirous of proceeding with "the construction of docks and wharves within said outer har- "bor, between the pier aforesaid on the south side of the en- "trance to the Chicago river and the north line of Randolph "street aforesaid extended eastwardly, in conformity with "the limiting harbor lines so fixed and established as afore- "said, and under the supervision of the Engineer Bureau of "the United States Government, and having agreed and "hereby expressly stipulating to conform to and observe the "plan of limiting harbor lines so recommended and approved "as aforesaid, as well as the directions which may be given in "reference to the proper construction of said docks and "wharves by the proper officers of the Engineer Bureau of "the United States.

"It is thereupon and in consideration of the premises stip- "ulated and agreed, that the injunctional order heretofore made "and entered of record in this cause, by agreement of the par- "ties, be set aside and vacated, and the information herein "dismissed, with leave to the said complainant to reinstate the "same whenever the said defendant shall fail or refuse to con- "form to the limiting harbor lines so established as aforesaid "and the directions of the proper engineer officer of the United "States in charge of the construction of docks and wharves in "the said outer harbor, or any part thereof." (Rec., 640–1.)

On the filing of this stipulation the injunction was dissolved, and the Railroad Company resumed the construction of pier No. 1 adjacent to the river and east of the breakwater of 1869.

The work on this pier appears to have been commenced after the passage of the Act of April 16, 1869, and to have been completed in 1873. During the same period a large part of the triangular space outside the breakwater of 1869, north of the south line of Monroe street, marked on the map "Built "1873," was filled with earth. There was also considerable filling done outside the breakwater near the foot of Fourteenth street, and an engine-house was constructed on the newly made land. A new line of breakwater between Twelfth street and Fourteenth street was built in the year 1870, as indicated on the map. This structure consisted of cribs made of timber, which were sunk in the lake loaded with stone. Between April 1869 and April 1873 more than $200,000 was expended by the Company upon these constructions. (Rec., 349–50, 355.)

On the 15th of April 1873, the Act of April 16, 1869 above referred to was repealed. (Rec., 609.) It is not pretended that the Illinois Central Railroad Company has ever assented in any way to the repealing Act, or that it is estopped by acquiescence or otherwise from asserting the rights and title vested in it under the Act of 1869.

The improvements, begun upon the granted lands before the repeal and not then completed, were prosecuted to completion afterwards; and between the date of the repealing Act and the commencement of this suit new works of considerable magnitude were undertaken and finished. In 1880 and 1881 piers 2 and 3 shown upon the Morehouse map were built north of Randolph street, in conformity to plans approved by the War Department. (Rec., 351, 370–1.) A copy of the tracing exhibiting the plan of these piers, and the correspondence between the engineer officers of the Government and the superintendent of the Railroad Company on the subject, have been introduced in evidence. (Rec., 352–3, 1,203.) The narrow strip of ground south of and adjacent to slip C and pier C was enclosed and filled in 1881 (Rec., 371); and an iron bridge or viaduct 1,760 feet or more in length was constructed the same year, extending from the foot of Randolph street over the railroad tracks to the base of pier3. The viaduct was needed to make the new piers accessible to the public, and authority to construct it was given by an ordinance of the city council passed July 12, 1880. (Rec., 299, 372, 646–7.) This ordinance provided for the extension of Randolph street

to the lake, and required that the cost of building and maintaining the viaduct and keeping it in repair should be borne by the Railroad Company, and that "the right to the use of the said bridge or viaduct shall be forever free to the public and to all persons having occasion to pass and repass thereon."

In 1882 the pier which had been built in 1870 extending from the foot of Twelfth street to a prolongation of the north line of Lot 21, was continued south to the center line of Sixteenth street extended. The old breakwater which was built in 1852 had become dilapitated, and experience had shown the necessity of having this protection placed at a greater distance from the railroad tracks. By the ordinance of 1852 the Company was required to erect and forever maintain a continuous line of pier work outside of its tracks of sufficient strength and magnitude to protect the shore from further damage from the lake. South of Lake Park this work was to be placed at such distance outside of the tracks "as may be expedient." The principal object of the new pier was to protect the railway tracks from injury by the waves during violent storms coming from the north-east. Another object was the construction of a slip between the breakwater and the shore, where vessels laden with materials for the Company's use or having freight to be handled, could enter and lie in safety. (Rec., 376–7.)

The large wharf shown on the Morehouse map at the foot of Thirteenth street was built in 1885. The plan was referred to the War Department and approved. As the new outer harbor was not then protected in any way from southerly and south-easterly storms, it was suggested by the resident officer of engineers in charge of the harbor that the wharf would be of advantage to shipping by intercepting the seas coming from a southerly direction; it was also required for the proper accommodation of the company's traffic. (Rec., 372–375.)

The outlay upon these different works between April 16, 1869 and April 1, 1887, appears to have been about $810,000, of which sum $200,000 and upwards was expended before April 15, 1873. (Rec,, 350, 352.) The whole amount expended on the Company's works along the lake shore since 1852, according to a careful estimate made by one of its officials, is upwards of $3,000,000. (Rec., 379–80.)

That the works are necessary in the strictest sense for the complete operation of the railroad, is conclusively established by the evidence. (Rec., testimony of E. T. Jeffery, 368, 375–379, 387; Clarence Buckingham, 483–495; George W. Cushing, 495–500; W. C. Garloch, 507–515.) On this point there is no conflict of testimony. That they have caused any obstruction to navigation or any detriment to the commercial interests, is not alleged in the information, or pretended by anybody.

Before concluding this statement attention should perhaps be called to the action of the War Department in 1881 and 1882, upon an application for permission to enclose and fill the unoccupied part of the strip three hundred feet wide in front of the public ground between Park Row and Randolph street, which the Company was authorized to appropriate to its use by the ordinance of June 14, 1852. The growth of traffic had been such as to require greater trackage accommodations, and the company thought it necessary to take possession of the strip one hundred feet wide, as yet unoccupied, on the east side of the breakwater. With this purpose in view a few piles were driven near Park Row, but the engineer officer in charge of the harbor objected to the work and it was discontinued. (Rec., 380, 390–1.) The matter was then referred to the War Department, and the action of the Department, including all the official correspondence on the subject, has been put in evidence. (Rec., 390–427.) The rights claimed by the Railroad Company are very fully explained in the letter of its Solicitor to the Secretary of War under date of July 25, 1881. (Rec., 397–401.) Attention was called in this communication to the decisions of this court, by which the doctrine is established that the title to land under navigable waters like the Great Lakes is vested in the respective States within which the land is situated; and it was submitted that the United States was in no way concerned in respect to the proposed extension of the Company's works one hundred feet farther into the lake, except so far as it might be important to inquire whether such extension would unnecessarily obstruct the harbor or impair the public right of navigation. The advice of the Attorney General (Benjamin Harris Brewster) was taken by the Secretary of War upon the legal question involved, whose official opinion on the subject is fully disclosed in the following extract from his reply to the Secretary under date of February 6, 1882:

"The question whether the ownership of the soil is in the "company or in the State, or elsewhere (the United States as- "serting no title thereto), appears to me to be unimportant so "far as the General Government is concerned, and the only "inquiry which need be entertained by your Department, is, "whether the construction of the 'dock line' will obstruct, en- "croach upon or interfere with the harbor improvement, and "thus injuriously affect its usefulness in the interest of navi- "gation. If so, it would not only be your duty to withhold "your assent to the prosecution of the work but to direct that "proceedings be taken in the proper court to enjoin the pro- "posed encroachment, should the company persist in going on "therewith. That the United States may avail itself of the "remedy by injunction to protect from injury improvements in "navigable waters made under the authority of Congres, is not "at all doubtful. (*Unted States* v. *Duluth*, 1 Dill., 469.) The "inquiry suggested above, however, being one of *fact*, I can "afford you no aid in determining it. In its consideration the "views of the officers of the Engineer Department, who have "immediate charge of the harbor improvement, are entitled to "very great weight, and will, I doubt not, enable you to reach "a correct conclusion." (Rec., 414.)

Acting upon this advice, the Secretary of War on the 14th of April 1882 approved a recommendation made by the Chief of Engineers, that the inquiry suggested by the Attorney General be submitted to a board of engineer officers, to consist of Gen. John G. Parke, Gen. C. B. Comstock and Gen. Godfrey Weitzel. (Rec., 416.)

The board met at Chicago on the 24th of May 1882, and, after examining the harbor and listening to the suggestions of all who had anything to say on the subject, submitted to the Secretary of War June 12, 1882 a report in writing, in which the conclusions they had reached were stated substantially as follows: The outer harbor can be made of the greatest advantage to the general commerce of the country and of Chicago only by the construction within it of wharves or docks, with intervening slips of suitable width and length, which should be fixed by a board of engineer officers specially convened for that purpose. In order that the heavy freights, especially grain, coal and lumber, may be moved with the greatest facility, elevators, cars and vessels must lie side by side. To develop the full value of the harbor railroad tracks

must therefore run down the piers. It is only in this way, by numerous piers with railroad tracks upon them connecting immediately with railways, that the full benefits of the harbor to navigation and commerce can be obtained, and the large sum spent by the United States in constructing it can produce its designed result. The present right of way of 200 feet held by the Illinois Central Railroad Company does not give a width sufficient to connect tracks on the piers with those of the present shore line. If they began 200 feet outside of the present shore line suitable curves could be put in. This line should, therefore, be established for that purpose. The strip 100 feet wide next landward of the ends of the piers should be a public highway, and the other strip 100 feet wide between this and the present shore protection should be occupied by the Illinois Central Railroad Company as desired by it. If this plan should be adopted by the Government, a very valuable franchise would be yielded to the railroad company, for which it should furnish some recompense. It should, therefore, be required to make the curved connection between its tracks and those on the wharves, and to haul the cars to and from those wharves at reasonable rates, unless its charter already covers both of those points. It should also be required to build at its own expense viaducts in sufficient numbers and of suitable construction to accommodate the commerce from the streets of the city to the proposed public highway adjacent to and on the other side of its tracks. These viaducts should be permanent structures, and should be promptly built when required by the Secretary of War. In suggesting this plan the question of the ownership of the submerged lands has not been considered, but only what right in the navigable waters of the harbor the government might relinquish in order that it may be of the greatest usefulness to commerce.

In direct answer to the question of fact submitted to the board the report says, "that the proposed extension of the "dock line by the Illinois Central Railroad Company, to which "in our plan, there is no objection, will encroach upon, "obstruct and interfere with the harbor at Chicago, Illinois, "but will not injuriously affect its usefulness in the interest of "navigation if that plan is executed. In our opinion the in- "junction or prohibition by the War Department against the "extension of the dock line by the Illinois Central Railroad "Company should be withdrawn, if this company will first

"furnish good and sufficient guarantee to the Secretary of "War that it will comply with all the requirements demanded "of it in the plan which we have above outlined." In conclusion the board express their concurrence in the report of the board of engineers of 1871, that no piers or wharves should be erected in the outer harbor of Chicago until the plans are approved by the Secretary of War. (Rec., 423-427.)

On the 28th of June 1882 the recommendations of the board were disapproved by the Secretary, for reasons set forth in a written memorandum filed with the report. The reasons assigned were: *First.* That the conditions to be imposed on the railroad company as suggested in the report, were such as under the existing circumstances the War Department had no legal power to make or to enforce. *Second.* That the plan submitted in the report was in fact a plan for the commencement of a system of wharves to be erected upon the submerged land, the title to which was in dispute; that properly the Secretary of War could give no approval to plans for wharves except when submitted by the person or corporation indisputably entitled to build them; that the approval of the plan recommended by the board would be in effect to yield possession to the railroad company, and such action would be, as the Secretary conceived, an assumption of judicial functions by the Department, which it was not proper for it to exercise in such a case. (Rec., 418-423.)

THE PLEADINGS.

THE AMENDED INFORMATION. Complainants allege: That the State is invested with complete sovereign and proprietary rights over that part of Lake Michigan which lies within its jurisdiction, subject only to the authority vested in Congress "to regulate commerce with foreign nations and among the "several States."

That the United States has commenced the construction of a harbor in front of fractional sections ten and fifteen in Chicago, having in view simply the erection of outer piers for the protection of shipping, leaving further improvements to be made, in accordance with the general designs of the Government, by the proprietors of the land under water and those having the right and power to make them.

Reference is made to the grant of public lands made by Congress in 1827 in aid of the Illinois and Michigan Canal, and to the various Acts of the State legislature relating to the canal referred to in the foregoing statement. It is alleged that fractional section fifteen was a portion of that grant; that the canal commissioners caused a *part* of the tract to be subdivided on or about June 13, 1836; and made and recorded a plat, and afterwards sold the lots; but that the subdivision was confined to the west part of the fractional section and did not extend east of Michigan avenue as now occupied and used, except for a short distance at the south end where block 23 is situated; that pursuant to the provisions of the legislative Acts of February 21, 1843, and March 1, 1845, a loan of $1,600,000 was subscribed for, and a deed was made by the Governor by which "all the canal lands then remaining unsold" were conveyed to the canal trustees; and it is claimed that under that general description the canal trustees acquired title to all that part of fractional section fifteen which lies east of Michigan avenue, except block 23, and continued seized and possessed of the same until August 19, 1871, when they reconveyed the same to the State. It is insisted that it was not in the power of the State during the intermediate period to grant any part of said land, whether submerged or not, to the Illinois Central Railroad Company.

Reference is made to the Act of Congress of September 20, 1850, by which the grant was made to the State in aid of the construction of the railroad afterwards built by the Illinois Central Railroad Company, and to the legislative Act of February 10, 1851, by which that Company was incorporated; also to the ordinances of the common council of Chicago of June 14, 1852, September 10, 1855, and September 15, 1856, by which consent was given to the location of the railroad within the city, and to the occupation by the Railroad Company of the several parcels of land therein described; and it is alleged that the Company entered upon and is now using the land "for the purpose of operating its said railroad within the limits of said city."

That in 1852, when the Company's breakwater was constructed and its railroad tracks laid, that part of fractional section fifteen occupied by them was, to a considerable extent, covered by the waters of the lake, but was dry ground when the tract was granted to the State; that it had become sub-

merged "by reason of certain artificial causes, and was at all times subject to and easy of reclamation," and was still part and parcel of the land granted to the State, subject to the trusts created by that grant and the Acts of February 21, 1843, and March 1, 1845, before referred to, and could not be used or applied for any other than canal purposes.

Reference is made to the legislative Act of April 16, 1869 referred to in the foregoing statement, and it is alleged that the claims made by the Company under that Act are without foundation. It is insisted that the Act was never passed by the legislature; that, if it was passed, it was inoperative and ineffectual for the purposes claimed, because the Company could not take or hold the land granted, and particularly could not take or hold the submerged land constituting the bed of Lake Michigan; that the legislature had no power to make the grant, and, if it had such power, the Act was invalid "for many reasons, and especially in this, that it was a private and local law, and embraced more than one subject, and embraced several subjects not expressed in the title."

It is further alleged that the Railroad Company had no riparian rights in fractional sections ten and fifteen, and that the Act of April 16, 1869, if otherwise valid, was void under the constitution of Illinois, because it would deprive the owners of land along the shore of the lake in those fractional sections, and among others the trustees at that time of the Illinois and Michigan Canal, of the rights incident to the ownership of land so situated without compensation.

It is alleged that no action was taken by the Railroad Company under the said Act, and that on the 15th of April 1873, the law was repealed; and it is insisted that the repeal had the effect to withdraw and take from the Company any title which may have passed by the repealed statute; that the Company was incapable under its charter of accepting the grant; and the Act was inoperative "by reason of the peculiarity in the terms of the grant, the legislature by such pretended Act purporting to grant the fee to said Railroad Company and by the said pretended Act expressly withholding from said Railroad Company the power to grant, sell or convey the same"; that if the Act had the effect to pass the title to the land granted, "it was a title subject to be resumed by the State which gave it"; that there was no consideration

for the grant, and the object and intention of the legislature in passing the repealing Act was "*to undo what had been done* by "that pretended Act of 1869, to *withdraw* what had been *given* "by that pretended Act, and to *revest* in the State whatever "title had been *divested* thereby."

Complaint is then made, that "the Illinois Central Rail-"road Company after its entrance into the city began a sys-"tem of encroachment upon the domain of the State, the first "indication of which was the procuring of the passage of the "ordinance purporting to grant in perpetuity the two triangu-"lar strips of ground near Randolph street, and which it im-"mediately entered upon, pretending to assume the right of "the city to grant the same, and is now using the same "under the same pretense; that it soon after began filling "with earth that portion of the bed of the lake in front of "fractional section ten north of Randolph street, under "the claim that having acquired the land on the shore "of the lake, the so-called riparian rights enabled it "to advance the shore and its own land into the lake at "its pleasure, or upon some other unfounded assertion of "right, but that this encroachment upon the property belong-"ing to the State was, after it had proceeded to a consider-"able extent, arrested by the action of the United States "in suing out of the circuit court of the United "States for the Northern District of Illinois, an injunction "prohibiting the continuance of the encroachment upon the "waters of the lake, which injunction remained in force until "dissolved by the Railroad Company entering into a stipula-"tion having the substantial effect of the injunction; that the "said Railroad Company not long ago entered upon the bed "of the lake in front of its breakwater and commenced to fill "the same with earth, with the view of using the same for "railroad purposes, and this was done under the claim that "the ordinance of the city above mentioned conferred upon it "the right to use land three hundred feet in width, and that "it was now occupying only two hundred feet in width, but "this encroachment was also prevented by the action of the "officers of the United States, whose request to the Railroad "Company to desist was sufficient, without the necessity of "suing out an injunction; that the said Railroad Company "has begun and is now prosecuting the work of filling with "earth and other materials, that portion of the bed of Lake "Michigan in front of fractional section fifteen, both north and

"south of lot 21, near its round-house, mentioned in said al-
"leged Act of the legislature of Illinois passed in 1869; that it
"is proceeding to sink lines of cribs of earth and stone in the
"lake in front of said section fifteen and enclosing within such
"lines large areas of the lake, which it then fills in with earth
"and other material in order to appropriate the ground so
"made and to use the same for railroad and other purposes;
"that your informant is informed that it justifies or pretends
"to justify such proceedings under the pretended Act of
"1869, so far as they are carried on north of its round-house,
"and by some claim of riparian rights, so far as they are car-
"ried on south of its round-house; that it also asserts that by
"its charter of 1851 it was empowered to use all the land and
"domain of the State which it might ever after need and de-
"sire for railroad purposes, while the truth and fact is that it
"has long ago made the location of its road and, as your in-
"formant believes, has caused the same to be recorded in the
"proper offices as the law requires, and its power to use the
"public domain has been long exhausted, and in addition
"thereto such enlargement and increase of its lands and facili-
"ties are not required for its own railroad purposes, but that
"other railroad companies have leased from the Illinois Cen-
"tral the use of its tracks, grounds and structures,
"from which a large rental is derived, and without such facili-
"ties so used and enjoyed by other railroad companies, its oc-
"cupancy of the public ground could be very much curtailed
"instead of being enlarged."

It is alleged that these claims and pretenses of the Railroad Company "are a great and irreparable injury to the State of "Illinois as a proprietor and owner of the bed of the lake, "throwing doubts and clouds upon its title thereto, and pre-"venting an advantageous sale or other disposition thereof"; that "the entry upon and the use and occupancy of the public "domain, as above set forth is a purpresture and a public "nuisance," and the court is called upon "to adjust and de-"termine the title to the portion of the lake in question, and to "limit and determine the rights therein and thereto of the "Illinois Central Railroad Company."

The prayer is, "that the title of the State of Illinois to the "bed of Lake Michigan may be established and confirmed; "that the claims of the said Railroad Company thereto under "the various grants and ordinances above referred to may be

"declared to be unfounded and without force, and that the "clouds and doubts cast thereby upon the title of the State be "removed; that the boundaries between the land of the "United States and the City of Chicago and of the State may "be ascertained, and the shore line and navigable water de- "termined; that the said Illinois Central Railroad Company "may be enjoined and restrained from filling any of the bed "of the lake, from sinking cribs or constructing piers therein, "or in any manner encroaching upon the domain of the State, "as the same is in this information asserted to exist, and that "the rights of the said Railroad Company, under the various "laws of the State, may be ascertained and declared; that the "structures and erections, all filling, piling and crib work and "pier constructions made by the Illinois Central Railroad "Company upon or in the said domain of the State, may be "directed to be removed, and such domain restored to the "condition in which it was before such encroachments were "made, and that the State of Illinois may be declared to have "the sole and exclusive right to develop the harbor of Chi- "cago by the construction of docks, wharves, etc., and to dis- "pose of such rights at its pleasure for the interests of the pub- "lic, and that such other and further or different relief may be "granted as is agreeable to equity." (Rec., 121-143.)

ANSWER OF ILLINOIS CENTRAL RAILROAD COMPANY. Respondent admits that upon the admission of the State of Illinois into the Union the title to the bed of Lake Michigan within its boundaries became vested in the State, with full power of alienation, subject to the rights of riparian owners and the power to regulate commerce vested in the Congress of the United States.

It admits that a breakwater has been constructed in front of the City of Chicago by the United States, but says that no docks or wharves have been made within the enclosed area except those provided by the Railroad Company, and that no detailed plan for the improvement of the harbor has been adopted by the Government, except in relation to the part thereof occupied and improved by the Company.

It admits that fractional section fifteen was one of the tracts of public land granted to the State by Congress in 1827 to aid in the construction of a canal, and that the canal commissioners subdivided the tract in 1836, and caused a plat thereof

to be made and recorded, but it says that the subdivision included the whole fractional section, and that the portion thereof lying east of the west line of Michigan avenue, except block 23, was designated on the plat as "Michigan avenue," and became thereby dedicated to public use.

It admits that a loan was made to the State pursuant to the provisions of the Acts of February 21, 1843, and March 1, 1845, and that to secure the loan a deed was made by the Governor to the canal trustees of "all the canal lands then remaining unsold"; but it denies that any part of fractional section fifteen passed by that conveyance. It alleges that the canal commissioners had long prior thereto sold and conveyed all the lots in the subdivision fronting on Michigan avenue to various persons, who purchased the same relying on the plat, and that no title to any part of the tract remained in the State at the time the conveyance was made to the canal trustees; that after that conveyance was made, and before the year 1871, the canal was completed and all the indebtedness of the State growing out of its construction fully paid, and that on or about the 19th of August 1871 the canal trustees released and reconveyed the canal to the State, and all the property, rights, privileges and franchises pertaining thereto. The respondent therefore claims and insists that whatever rights, if any, the canal trustees may have acquired in fractional section fifteen, were released by that conveyance, and that all grants made by the State of lands in that section were binding *on the State* from the time they were made, and became absolute and effectual at least upon the execution of the release, if not before.

It admits the passage of the Act of Congress of September 20, 1850, donating land to the State in aid of the construction of the railroad, and the Act of February 10, 1851, incorporating the Illinois Central Railroad Company; also the passage of the city ordinances of June 14, 1852, September 10, 1855, and September 15, 1856, and says that it has faithfully observed and performed all the conditions thereof; it also admits that it entered upon the lands described in said ordinances, and says they were and are necessary for the maintenance and operation of its railroad and that it is rightfully entitled to hold and use the same. It alleges that it has been in the actual possession of the strip of ground 300 feet wide in front of fractional sections ten and fifteen, or of so much thereof

as lies west of the exterior line of its breakwater, continuously since 1853, and of the triangular pieces of ground referred to in the ordinances of September 10, 1855, and September 15, 1856, since the year 1856, under a claim of title, in each case, exclusive of any other right, and the complainants' cause of action in respect of the said parcels of land, if any there may be, did not accrue within twenty years before the commencement of this suit. It submits to the court that all the matters in said information complained of in respect of the said parcels of land are matters which may be tried and determined at law and are not cognizable in a court of equity; and it asks to have the same benefit of these defenses as if it had pleaded the same, or demurred to so much of the information as relates thereto.

It admits that in the year 1852 a considerable portion of what is now solid ground between Randolph and Twelfth streets, lying west of the railroad and east of Michigan avenue, was covered by water, but whether the solid ground extended at any time prior thereto beyond the west line of the railroad the respondent is not informed. It says that in 1852 the waters of the lake were advancing upon the shore, and had at some points between Randolph and Twelfth streets reached the eastern line of Michigan avenue as then laid out; that since the year 1852, and especially in 1872, immediately after the great fire in Chicago, the space between the avenue and the railroad, or that part of it then under water, was used as a dumping ground for the deposit of the waste and debris of the city, and that by such means, and without expense to the city, the ground has been filled nearly to a level with Michigan avenue.

It admits the passage of the Act of April 16, 1869, and claims the benefit of it as a valid and subsisting law. It insists that the Act was duly and constitutionally passed and took effect as a law of the State and became obligatory as such on the day of its passage. It denies that no action was taken in respect of the grants made to the respondent in said Act. On the contrary, it states the fact to be that within a reasonable time after its passage, to wit, July 6, 1870, it formally accepted the same and caused notice of such acceptance to be filed and made a matter of record in the office of the Secretary of State for the State of Illinois. It also avers that, relying upon the provisions of said Act, it entered upon, reclaimed and reduced to profitable use considerable portions of the submerged land therein described, before the Act was repealed, and expended

about $500,000 in so doing. It is further stated that the land so reclaimed has been otherwise improved at great expense, and is now in use by the respondent for carrying on its business and is necessary for such use. It is insisted that by said Act the State granted to the respondent the absolute title to the submerged lands therein described; that it was a grant *in præsenti*, and that the Act and the acceptance thereof constituted a valid contract between the State and the respondent, which could not be revoked or impaired without the consent of both parties thereto. The power of the legislature to make the grant and the capacity of the Railroad Company to accept it are insisted on; and the claim made by the State that the Act was inoperative by reason of any "peculiarity in the terms "of the grant," or that the grant was subject to revocation for want of consideration, is denied.

It admits the passage of the repealing Act of April 15, 1873, but says the Act has never been assented to or acquiesced in by the respondent, and is unconstitutional and void, because it was passed in violation of the first clause of section 10, article 1, of the Constitution of the United States, which prohibits the State from passing any law impairing the obligation of contracts, and also because it is repugnant to the first section of the fourteenth amendment of the Constitution of the United States, which declares that no State shall deprive any person of life, liberty or property without due process of law.

It also submits that the said Act is inoperative and void for the additional reason, that it is repugnant to that clause of the Constitution of the State of Illinois then and still in force, which provides that "no contract, obligation, or liability whatever of "the Illinois Central Railroad Company to pay any money in- "to the State treasury, nor any lien of the State upon or right "to tax property of said Company, in accordance with the "provisions of the charter of said Company, approved Febru- "ary tenth, in the year of our Lord one thousand eight "hundred and fifty-one, shall ever be released, suspended, "modified, altered, remitted, or in any manner diminished or "impaired, by legislative or other authority."

The respondent denies that it has ever encroached upon the domain of the State; but says that, having become the owner of all the land on the shore between Randolph street and the river, it has filled up a portion of the bed of the lake directly in front of said land and is occupying the same for the pur-

poses of its business and in furtherance of the commerce of the city. It admits that these improvements were at one time suspended in consequence of an information filed in behalf of the United States for an injunction; but says that a conference took place between the respondent and the officers of the War Department, the result of which was that the plan of the proposed improvements was agreed to, and the work was afterwards completed in accordance with the agreement. It admits that it has begun the work of filling with earth a portion of what was at the time of the passage of said Act of 1869 the bed of the lake, north of the south line of lot 21; but says that it is the owner in fee of all the ground bordering the lake at the points where such work is in progress. The respondent alleges that none of the improvements made or in contemplation extend or are intended to be extended into the lake to the detriment of commerce, or that they do, or will when completed, interfere with or obstruct navigation; and it claims title to the lands reclaimed and the right to the possession and use thereof, under and by virtue of its charter, the Act of April 16, 1869, and its rights as riparian owner.

The respondent denies that it claims or has ever claimed the right to fill up the bed of the lake to an indefinite extent, or to any extent detrimental to the interests of commerce, as the same may be determined by the proper officers of the United States, but it claims the right to make improvements on the shore of the lake, within the limits of its riparian ownership, for the necessary accommodation of its railroad traffic and the promotion of commence and navigation, and also to the extent authorized by the said Act of 1869. It admits that in taking possession of, improving and making available for business purposes the shallow waters of the lake adjacent to the shore, it is and will be subject to all the conditions, requirements and obligations imposed by the said Act; and it submits that by reason of said Act and the acceptance thereof the State is estopped from asserting, as against the respondent, any right, title or interest in respect of the matters alleged in the said amended information. (Rec., 69 – 95, 166.)

ANSWER OF THE CITY OF CHICAGO. By its answer to the original information all the facts therein stated are admitted. But the amended information contains additional averments, and in its answer to the latter the city insists that the plat of fractional section fifteen included all the land in the

fractional section; that the plat was certified, acknowledged and recorded in conformity to the laws of the State then in force relating to town plats, and that by virtue of such laws the plat became and was a conveyance of all that portion of the tract thereon designated as Michigan avenue to the municipality then known as the town of Chicago, to be held by it "in trust for the people of the State of Illinois for the public use indicated by the designation on the face of the plat". It denies that this land or any part of the fractional section was conveyed by the Governor to the canal trustees, and avers that the legislature by the Acts approved February 18, 1861 and February 13, 1863 (referred to in the preceding statement) expressly ratified and confirmed the dedication to public use of all the ground shown on the plat lying north of block 23 and east of the lots abutting on Michigan avenue. It is further averred that the city has been in possession of the ground since its incorporation in 1837, and "has expended thousands of dollars in protecting the same from the encroachment of Lake Michigan and in restoring the same from and after the abrasions made by the waters of said lake."

It is stated that on the 23d of April 1875 the city adopted the Act of the legislature entitled "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, and that by said Act it has the following among other powers: "To erect and keep in repair public landing places, "wharves, docks and levees. To regulate and control the use "of public and private landing places, wharves, docks and lev-"ees. To fix the rate of wharfage and dockage. To collect "wharfage and dockage from all boats, rafts or other craft "landing at or using any public landing place, wharf, dock or "levee within the limits of the corporation." Defendant also says that "by said Act it is given jurisdiction upon all waters within or bordering upon said city to the extent of three miles beyond the limits of the city."

Defendant further states that on the 7th of June 1839 the United States caused so much of fractional section ten as lay south of the Chicago river to be subdivided and platted in accordance with the laws of the State; that a plat thereof known as "Fort Dearborn Addition to Chicago," was duly made, certified, acknowledged and recorded, and that the said plat by virtue of the laws of the State then in force became and was a conveyance to the city of all the streets, avenues, alleys

and public grounds delineated on the map, to be held in trust for the public use.

It claims to have been since the plats of fractional sections ten and fifteen were made and recorded entitled to all the rights of a riparian owner on the shore of the lake from Randolph street to Park Row; and says that by virtue of several Acts of the legislature particularly mentioned it is and has been charged with the duty of developing, protecting and controlling the harbor; that the harbor of the city has heretofore consisted largely of the Chicago river, which has a dock frontage many miles in extent, but that the increase of population and business has been such as to require greater harbor facilities, and the duty rests upon the city to provide the same, "and to that end to avail itself of the dock frontage from Randolph street to Park Row, its ownership whereof and the rights appurtenant whereto it has never parted with."

Reference is made to the Act of April 16, 1869, and it is alleged that the city has never accepted the same, and is not bound thereby. It is insisted that the Act is void for lack of power in the legislature to make the grants therein attempted to be made; that the Illinois Central Railroad Company had no power to enter upon the erection of docks and wharves and the construction of a harbor in the waters of the lake, and could derive no such power under or by virtue of said Act; that the Act never became operative, and the subsequent Act of April 15, 1873 was a valid revocation thereof. (Rec., 97–100, 104–108.)

Cross-Bill of the City of Chicago. The cross-bill repeats the averments made by the city in its answer, and further alleges that although a right of way was allowed to the Illinois Central Railroad Company by the ordinance of June 14, 1852, upon the conditions therein expressed, yet that ordinance contains nothing to divest or limit the city's rights in the premises; that said company sets up and asserts that it is empowered by the act of April 16, 1869, to interfere with the rights and ownership of the city, and threatens to fill with earth a portion of the bed of the lake in front of fractional sections ten and fifteen, and to take possession of and use the same for wharfage, dockage and landing purposes; that the intrusion thus threatened would inflict a peculiar damage upon the city; that the claims and threats of the said company throw doubts and clouds upon the city's title, prevent it from making

an advantageous use of its riparian rights and developing its harbor, thereby inflicting injuries which can be relieved only in a court of equity.

The relief prayed for is, that the city's title to the portion of fractional sections ten and fifteen thereinbefore described be adjudicated by the court; that the city may be declared to be the owner in fee thereof, and of the riparian rights thereunto appertaining, and to have the sole and exclusive right to develop the harbor by the construction of docks, wharves and levees, and "the disposition of said rights by lease or otherwise, as authorized by law;" that the Railroad Company be enjoined from interfering with the city's rights and ownership, as aforesaid, and that such further and other relief may be granted as shall be agreeable to equity. (Rec., 108–117.)

THE STATE'S ANSWER TO THE CROSS-BILL. The State denies that any part of fractional section fifteen, lying east of the east line of Michigan avenue was included in the subdivision made by the canal commissioners in 1836, except block 23; it also denies that the plat became under the laws of the State, then in force, a conveyance of that part of the fractional section to the city of Chicago, or that the city is or ever has been the owner thereof as claimed in the cross-bill. It insists that the canal commissioners had no authority to dedicate the said land to public use, and denies that the legislature did or could ratify any such pretended dedication.

It admits that the plat of "Fort Dearborn Addition" was made, certified and recorded in conformity to the laws of the State, and that the fee of all streets, avenues, alleys and public grounds shown thereon passed to the city by virtue of the plat.

It denies that the city is or ever has been entitled to the rights of a riparian owner on the shore of the lake in front of fractional section fifteen, but says, on the contrary, that the State is and always has been the owner of all that part of the fractional section adjacent to the lake, north of block 23, and is entitled to all the riparian rights and privileges appurtenant thereto.

It denies any right or ownership in the city which authorizes or permits it to avail itself of the dock frontage between Madison street and Park Row; and insists that the use of the

so-called public ground on the lake front in fractional section fifteen has always been subject to the paramount right of the State at any time to put a stop to the same. (Rec., 144–151.)

THE RAILROAD COMPANY'S ANSWER TO THE CROSS-BILL. The respondent admits that the plat of fractional section fifteen included the whole fractional section, and that all that portion of the tract designated on the plat as Michigan avenue became thereby dedicated to public use; but it denies that any beneficial interest in the land became vested in the City of Chicago, or that the city ever had or held any interest therein, except as a mere naked trustee for public uses; such uses being at all times subject to the control and disposition of the State legislature.

It admits that the legislature by the Acts of February 18, 1861 and February 13, 1863 ratified and confirmed the setting apart of the said land for public uses, but it denies that the city acquired by either of said Acts any other or greater interest in the land than it had previously held.

It admits the making and recording of the plat of Fort Dearborn Addition to Chicago in 1839, but whether the plat operated as a conveyance to the city of the streets and public grounds thereon designated, or is evidence only of a dedication at common law, the respondent leaves to the judgment of the court upon such proofs as may be presented.

It denies that the city is or has been entitled to the rights of a riparian owner on the shore of the lake in front of fractional sections ten and fifteen, or that by virtue of any law of the State referred to in the cross-bill it has been charged with the duty of developing, protecting or controlling the harbor, or endowed with the requisite powers for so doing, or that it is now or ever has been able, under the constitution and laws of Illinois, to acquire funds for such purpose.

It alleges that whatever interest or title the city may have acquired to the open ground in fractional sections ten and fifteen, it acquired, and, so far as the land is undisposed of, still holds the same as a naked trustee for the use and benefit of the public, and as a municipal corporation organized for the purposes of local government in aid of and as an agency for the State of Illinois; that such title and interest has been at all times subject to the control and disposition of the legislature,

and that the city cannot set up any claim, either as trustee or otherwise, as against the Acts and grants of the State.

It further alleges that by the location of the railroad in front of fractional section fifteen and that part of fractional section ten south of Randolph street, a strip of land two hundred feet in width was interposed between the public ground and the lake, to which the respondent acquired title by virtue of the grant from the State in its charter, and that it thereby became and ever since has been and still is entitled to all the rights and privileges of a riparian owner in respect to the submerged land lying east of and adjacent thereto.

The respondent insists that the Act of April 16, 1869, took effect as a law and contract of the State, according to the terms and conditions thereof, upon its passage by the legislature; that it was competent for the legislature to make the grants therein contained; that the respondent had full power and authority to accept them, and if there was any incapacity in this respect under its original charter, the infirmity was cured by the said Act itself; that the consent of the city was not necessary to the acquisition by the respondent of the rights and interests thereby granted; that the grants so made were formally accepted by the respondent before the passage of the repealing Act of April 15, 1873, and that the last-mentioned Act is inoperative and void for the same reasons which are set forth in its answer to the amended information. (Rec., 151–163.)

THE DECREE.

IT IS FOUND AND ADJUDGED: That—saving the rights hereinafter defined of the Illinois Central Railroad Company—(1) the fee of all the streets, avenues, alleys and public grounds shown upon the plat of Fort Dearborn Addition to Chicago, including the open space on the shore of the lake south of the north line of Randolph street extended to the lake and north of the line between fractional sections ten and fifteen, upon which, as the same appears upon the plat, are the words: "Public ground, forever to remain vacant of buildings"; and (2) the fee of that part of fractional section fifteen which is bounded on the north by the line between fractional sections ten and fifteen, on the west by the west line of Michigan avenue, on the east by Lake Michigan, and on

the south by the north line of block 23, as the same appears on the plat of the canal commissioners' subdivision acknowledged June 13, 1836; and (3) the fee of all the made or reclaimed ground as it now exists and as it appears on the Morehouse map, east of Michigan avenue and between the north line of Randolph street extended to the lake and the north line of block 23 extended to the lake, including the grounds upon which rest the tracks and breakwater constructed by the Railroad Company between said last mentioned lines on the lake front, and including the small triangular piece of ground east of the tracks and breakwater of the Company between the north lines of Washington and Monroe streets extended to the lake, and marked on the Morehouse map "Built 1873,"—are all in the city of Chicago in trust for public use.

That the city of Chicago, as riparian owner of said grounds on the east or lake front of said city, between the north line of Randolph street and the north line of said block 23, each produced to Lake Michigan, and in virtue of authority to that end conferred by its charter, has, among other powers, the power to construct and keep in repair on said lake front, east of said premises within the lines last given, and in such manner as may be consistent with law, public landing places, wharves, docks and levees, subject, however, in the execution of that power, to the authority of the State by legislation to prescribe the lines beyond which piers, docks, wharves and other structures, other than those erected by the General Government, may not be extended into the waters of the harbor that are navigable in fact, and to such supervision and control as the United States may rightfully exercise in and over said harbor, and subject also to the enjoyment by the Illinois Central Railroad Company of the rights now to be defined and decided.

That the Illinois Central Railroad Company is the owner in fee of all the wharves, piers and other structures erected by it in the city of Chicago, east of Michigan avenue, south of Chicago river, and north of the north line of Randolph street extended eastwardly, as shown upon the Morehouse map (made part of the decree), including the station grounds lying west of the slip C, the pier marked C lying east of slip C and represented upon the Morehouse map to have been built in 1867, and piers 1, 2 and 3, lying east of pier C last mentioned and represented upon said map to have been built as

follows: pier 1 in 1872 and 1873, pier 2 in 1881, and pier 3 in 1880, and is also entitled to the use, for purposes of its business, of the slips marked on said Morehouse map.

That said Company is likewise the owner in fee of all the wharves, piers and other works constructed by it east of its main tracks between the north line of block 23 in fractional section fifteen and the center line of Sixteenth street extended, including the pier or line of piling represented on the Morehouse map to have been built in 1870, and the station grounds lying west of the said pier and contiguous thereto; also of the wharf projecting into the lake from the grounds last mentioned and represented upon the Morehouse map to have been built in 1885; which said wharves and other works so constructed and so far as constructed are lawful structures and not encroachments upon the domain of the State of Illinois, or upon the public right of navigation, or upon the property, interests or estate of the city of Chicago.

That the present occupancy and use by the Illinois Central Railroad Company, for purposes of right of way and not otherwise, of two hundred feet in width of ground north of the southern boundary of the open space known as Lake Park (the west line of said ground being 400 feet from and parallel with the west line of Michigan avenue), and its occupancy and use for like purposes of the two triangular pieces of ground immediately south of Randolph street and east of the Company's present tracks, one of them being east of the breakwater and marked "Built 1873", are in accordance with law and the provisions of certain ordinances of the city of Chicago passed July 14, 1852, September 10, 1855, and September 15, 1856.

That said Company is entitled to the use in perpetuity of the said two hundred feet in width and said two triangular pieces of ground last described for purposes of a right of way and not otherwise, subject to such regulations in respect to said use as the city of Chicago or the State of Illinois may legally establish, and subject to the terms and conditions of said ordinances of 1852, 1855 and 1856, except that if the city could consistently with the charter of said Company grant to it, as by said ordinance of 1852 it assumed to do, the right to use for its line of road and other works necessary to protect the same from the lake a width of 300 feet from the southern boundary of Lake Park near Twelfth street to the north line of

Randolph street, the said Company has elected to appropriate for such purposes a width of only 200 feet, and cannot now, without further license from proper public authority, appropriate a greater width.

That the bridge or viaduct constructed by the Illinois Central Railroad Company over its tracks and grounds at the foot of Randolph street, with the approaches thereto, is a lawful structure, having been erected in conformity to the provisions of the ordinance legally passed by the city council of Chicago July 12, 1880.

That the third section of the Act of the General Assembly of the State of Illinois passed April 16, 1869, entitled "An Act in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the City of Chicago," so far, at least, as it confirms "the right of the Illinois Central Railroad Company, under the grant from the State in its charter, . . . and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise, lying east of the said line running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections ten and fifteen," is a valid and constitutional exercise of legislative power, and legalizes as well what was done by said company prior to April 16, 1869, in the way of filling in the lake and constructing wharves, piers, tracks, warehouses and other works between the Chicago river and the north line of Randolph street extended eastwardly, as its occupancy and use for way ground of the said triangular pieces of ground immediately south of Randolph street; and that the subsequent Act of the General Assembly of Illinois passed April 15, 1873, in so far as it sought, by repealing the said Act of April 16, 1869, to revoke or annul said confirmatory clause of the last named Act, was void under the constitution both of Illinois and the United States. But the court is of opinion, and so adjudges and decrees, that the said Act of April 15, 1873, repealing said Act of April 16, 1869, had the effect in law to withdraw from said Railway Company the grant to it, its successors and assigns, by the third section of said Act of April 16, 1869, of "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan

and lying east of the tracks and breakwater of the Illinois Central Railroad Company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the round-house and machine shops of said Company, in the south division of the city of Chicago," and to reinvest the State with such right and title as it had in and to the said premises prior to the passage of said Act of April 16, 1869; and said repealing Act had the further effect to withdraw from said Company the additional powers conferred upon it by said Act of April 16, 1869 to improve the harbor of Chicago and engage in the business of constructing and maintaining wharves, piers and docks for the benefit of commerce and navigation generally, and not in the prosecution of its business as defined and limited by its original charter and the laws of the State, saving, however, to said Company, as unaffected by said repeal, the right to hold and use as part of its way-ground or right of way, and not otherwise, the before mentioned part of the submerged lands east of its breakwater, between Monroe and Washington streets extended eastwardly, which was reclaimed from the lake in 1873, presumably upon the faith of the Act of 1869, and is marked on the Morehouse map with the words "Built 1873."

It is further ordered, adjudged and decreed, that the Illinois Central Railroad Company be perpetually enjoined from erecting structures in or filling with earth or other materials any portion of the bed of Lake Michigan as it now exists, and as shown on said Morehouse map, east or in front of said fractional sections ten and fifteen—that is, east or in front of the grounds now occupied and used by it, between the Chicago river and the center line of Sixteenth street, extended eastwardly, except that said Company may complete the slip or basin already commenced immediately north of Sixteenth street extended, with a wharf on each side of it not exceeding 100 feet in width in each, where vessels coming into such slip or basin may load and unload, and upon which tracks of the Company may be laid. (Rec., 220-225.)

ASSIGNMENT OF ERRORS

The Illinois Central Railroad Company assigns for error:

1. That part of the said decree by which it is found and adjudged, that (saving the rights thereinafter defined of the Illinois Central Railroad Company) the fee of all the made or reclaimed ground, as it now exists and as it appears on the Morehouse map (made a part of the decree), east of Michigan avenue and between the north line of Randolph street extended to Lake Michigan and the north line of block twenty-three extended to the lake, including the grounds upon which rest the tracks and breakwater constructed by said Company on the lake front between said last named lines, and including the small triangular piece of ground east of the present tracks and breakwater of said Company between the north lines of Washington and Monroe streets extended to the lake, and marked on the Morehouse map with the words "Built 1873," are all in the city of Chicago in trust for public use; and that the said city of Chicago, as riparian owner of said grounds on the east or lake front of said city between the north line of Randolph street and the north line of said block twenty-three, each of said lines being produced to the lake, and in virtue of authority to that end conferred by its charter, has among other powers the power to construct, erect and keep in repair on said lake front east of said premises within the lines last given, and in such manner as may be consistent with law, public landing places, wharves, docks and levees.

2. That part of the said decree by which it is found and adjudged that, if the city of Chicago could consistently with the charter of the Illinois Central Railroad Company, "grant to it—as by said ordinance of 1852 it assumed to do—the right to use for its line of road and other works necessary to protect the same from the lake, a width of 300 feet from the southern boundary of Lake Park near Twelfth street to the north line of Randolph street, the said Company has elected to appropriate for such purposes a width of only 200 feet, and cannot now without further license from proper public authority appropriate a greater width."

3. That part of the said decree by which it is found and adjudged, that the Act of the General Assembly of the State of Illinois passed April 15, 1873, repealing the prior Act of the

General Assembly of said State passed April 16, 1869, entitled "An Act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the City of Chicago," had the effect in law to withdraw from said Railroad Company the grant to it, its successors and assigns, by the third section of said Act of April 16, 1869, of "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company for a distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot 21, south of and near to the round-house and machine shops of said Company, in the south division of said City of Chicago," and to reinvest the State with such right and title as it had in and to said premises prior to the passage of said Act of April 16, 1869; and that said repealing act had the further effect to withdraw from said Company the additional power conferred upon it by said Act of April 16, 1869, to improve the harbor of Chicago and to engage in the business of constructing and maintaining wharves, piers and docks for the benefit of commerce and navigation generally, and not in the prosecution of its business as defined and limited by its original charter and the laws of the State.

4. That part of the said decree by which it is adjudged and decreed, that the Illinois Central Railroad Company be perpetually enjoined from erecting structures in or filling with earth or other materials any portion of the bed of Lake Michigan, as it now exists and as shown on said Morehouse map, east or in front of said fractional sections ten and fifteen—that is, east or in front of the grounds now occupied and used by it between the Chicago river and the center line of Sixteenth street extended eastwardly—except that said Company may complete the slip or basin already commenced immediately north of Sixteenth street extended, with a wharf on each side of it not exceeding 100 feet in width in each, where vessels coming into such slip or basin may load and unload, and upon which tracks of the Company may be laid.

All of which, saving the exception aforesaid relating to the completion of the slip or basin immediately north of Sixteenth street extended, with a wharf on each side of it, is, as appellant is advised and respectfully submits, erroneous. (Rec., 652–654.)

The Attorney General of the State assigns for error:

That the court erred in sustaining the validity of the Act of April 16, 1869, and in confirming the title of the Illinois Central Railroad Company to the portion of the submerged lands reclaimed by said Company prior to the repeal of said Act. (Rec., 657.)

BRIEF.

1. The railroad company is charged in the information with an invasion of the proprietary interest of the State in the bed of the lake. The encroachments complained of are upon the *jus privatum* or right of property asserted by the State, and not upon the *jus publicum* or governmental control over navigable waters vested in the State for public purposes.

There is a broad distinction between a violation of the public right in navigable waters and an invasion of the proprietary interest of the sovereign. The one creates a public nuisance; the other a purpresture.

Gould on Waters, Sec. 21.
Kerr on Injunctions, 395.

To constitute a public nuisance, there must be damage to the public right of navigation. No charge of that nature is preferred in the information, nor is any proof which would sustain such a charge to be found in the record. The *acts* complained of are simply trespasses on lands, once under water, claimed to be the property of the State.

It is alleged in the information, that the claims made by the railroad company "are a great and irreparable injury to the "State of Illinois as a proprietor and owner of the bed of the "lake, throwing doubts and clouds upon its title thereto and "preventing an advantageous sale or other disposition thereof"; and in the prayer for relief the State asks, that its title "may "be established and confirmed, that the claims made by the "said railroad company · · · may be declared to be "unfounded and without force, and that the clouds and doubts "cast thereby upon the title of the State be removed · · "and that the State of Illinois may be declared to have the

"sole and exclusive right to develop the harbor of Chicago by "the construction of docks, wharves etc., and to dispose of such "rights at its pleasure."

To make out a case the State must establish a legal title and right of possession to the premises in controversy.

II. The complainants allege and the respondent admits, that upon the admission of Illinois into the Union in 1818 the title to the bed of Lake Michigan, or so much of it as lies within the boundaries of the State, became vested in the State.

Upon the separation of the British Colonies in America from the mother country, they succeeded as sovereign States to the title of the crown in the tide waters within their territorial limits. Both the *jus publicum* and the *jus privatum*, which before then had been vested in the crown and parliament, or in the local governments established under the royal sanction, became vested in the several States. They acquired not only the ownership of the soil under navigable waters, but also the legislative authority to regulate and control the rights of the public. All the prerogatives and powers which before belonged either to the crown or parliament, became immediately vested in the State.

Martin v. *Waddell*, 16 Peters, 367.
Smith v. *Maryland*, 18 How., 71.
Commonwealth v. *Alger*, 7 Cush., 53.
Nichols v. *Boston*, 98 Mass., 39.
People v. *New York Ferry Co.*, 68 N. Y., 71.
Langdon v. *Mayor of New York*, 93 N. Y., 129.
Stevens v. *Patterson and Newark R. R. Co.*, 34 N. J. Law, 532.
Gould on Waters, Sec. 32.

The States since admitted into the Union have the same proprietary rights, sovereignty and jurisdiction in and over navigable waters within their respective limits and the soil under them, as the original thirteen States.

Pollards' Lessee v. *Hagan*, 3 How., 212.
Goodtitle v. *Kibbe*, 9 How., 471.
Den v. *Jersey Company*, 15 How., 426.
Weber v. *Harbor Commissioners*, 18 Wall., 57.
Knight v. *U. S. Land Association*, 142 U. S., 161.

The foregoing cases relate to lands under tide waters; but the principles enunciated are equally applicable to navigable waters above the flow of the tide.

County of St. Clair v. *Lovingston*, 23 Wall., 46.
Barney v. *Keokuk*, 94 U. S., 324.
Packer v. *Bird*, 137 U. S., 661.
Hardin v. *Jordan*, 140 U. S., 371.

Like all other property belonging to the State, land so situated may be dealt with and disposed of according to the pleasure of the legislature, subject only to the rights incident to private ownership of land on the shore, and to the exercise of the authority possessed by congress over navigable waters by virtue of its power to regulate commerce with foreign nations, and among the several States.

By the Constitution of Illinois in force from 1848 to 1870, the general assembly was invested with full legislative authority. (Article 3, Section 1.) It is an established principle of public law in the United States that the legislature of a State may enact any law on any subject, unless restricted by some limitation in the State or Federal constitution. It has, in general, supreme control over the property and revenues of the

State, and may dispose of the property of the State in navigable waters in any way which will, in its opinion, promote the interests of the public.

Langdon v. *Mayor of New York*, 93 N. Y., 129, 156.
Kerr v. *West Shore Railroad Co.*, 127 N. Y., 269.
Lyman v. *Gedney*, 114 Ill., 388.
Harris v. *Board of Supervisors*, 105 Ill., 445.
Cairo and St. Louis R. R. Co. v. *Warrington*, 91 Ill., 157.
Mason v. *Wait*, 4 Scam., 127.
Nichols v. *Boston*, 98 Mass., 39.
Hoboken v. *Penn. Railroad Co.*, 124 U. S., 657.
Pound v. *Turck*, 95 U. S., 459.
City of New York v. *Miln*, 11 Peters, 103.
Cooley's Const. Limitations, 87–89.

III. The Illinois Central Railroad Company was authorized and required by its charter to lay out and construct a railroad *into* the city of Chicago. (*Ante*, p. 5.) To aid in building the road, extensive grants of land were made by the State to the Company—among them, the following:

"SEC. 3. The said corporation shall have right of way "upon, *and may appropriate to its sole use and control* for the "purposes contemplated herein, land not exceeding 200 feet "in width, through its entire length; may enter upon and take "possession of and use all and singular any lands, streams and "materials of every kind, for the location of depots and stop-"ping stages, for the purpose of constructing bridges, dams, "embankments, . . . station grounds, . . . turn-"outs, engine-houses, shops and other buildings necessary for "the construction, completing, altering, maintaining, preserv-

"ing and complete operation of said road. *All such lands,* "*waters, materials and privileges belonging to the State, are* "*hereby granted to said corporation for said purposes.*" (*Ante*, p. 4.)

The effect of these words is obviously to invest the company with a complete title to all the lands belonging to the State, which should be required and taken for the purposes mentioned.

Potomac Steamboat Co. v. *Upper Pot. S. Co.*, 109 U. S., 672, 680.

Van Ness v. *City of Washington*, 4 Pet., 232, 284.

The grant is not confined to a way two hundred feet in width; but the charter authorizes in express terms the appropriation of as much more land as should be needed for station grounds, turnouts, etc., necessary for the "construction, com- "pleting, altering, maintaining, preserving and complete oper- "ation of said road."

The right of the company to appropriate to its use the lands of the State, is co-extensive with the power conferred by the same section of the charter to acquire by purchase or condemnation the lands of private owners. The latter is a continuing power which may be exercised from time to time as the necessities of the company may require.

Chi. and West Ind. R. R. Co. v. *Ill. Cen. R. R. Co.* 113, Ill., 156.

Railroad Co. v. *Wilson*, 17 Ill., 123.

N. Y. & H. R. R. Co., v. *Kip*, 46 N. Y., 546.

Lewis on Eminent Domain, Sec. 259.

The charter is still a law of the State. No attempt has been made to repeal it, or to restrain by subsequent legislation the exercise of the right to enter upon and use the lands

of the State. There is no limitation as to the time when, or the number of times, the right may be exercised. The only limit in this respect is the reasonable necessity of the corporation in the discharge of its duty to the public

IV. The consent of the common council of Chicago to the location of the railroad within the city, was required by the eighth section of the company's charter. An ordinance granting that consent was passed June 14, 1852, and a formal contract under seal was entered into between the railroad company and the city, in which it was covenanted that the ordinance should be of perpetual obligation, and that each party would abide by and perform all the obligations therein contained accrding to the true intent and meaning thereof. (Record, 623–31.)

The assent was given on conditions which were extremely burdensome, but they have been fully complied with. The railroad was located and built in the open waters of the lake in front of fractional sections ten and fifteen, as directed by the common council; and the company had been in peaceable possession of the grounds appropriated for that purpose, with the exception of a strip one hundred feet in width on the east side of the railroad tracks, for thirty years before the commencement of this suit.

By the terms of the ordinance the company was permitted (Sec. 2), "to enter upon and use in perpetuity, for its line of road *and other works necessary to protect the same from the lake*, a width of three hundred feet from the southern boundary of the public ground near Twelfth street to the northern line of Randolph street." And it was authorized (Sec. 9), to use the ground, not only for the passage of trains, but also "for making up and distributing trains." It was also pro-

vided (Sec. 3), that the company might extend its works and fill out into the lake, between Randolph street and the river, "to a point in the southern pier [at the mouth of the river] 400 feet west of the east end of the same." Here (Sec. 1) the depot was to be located and such *buildings* and *slips* as might be necessary and convenient for the company's business.

It is tacitly conceded, that the land thus authorized to be appropriated was "necessary for the construction, maintaining, preserving and complete operation of the railroad." It is true that the city had no proprietary interest in the bed of the lake, and could convey none to the company; but it had police jurisdiction over the waters within a mile of the shore, and authority to determine where the road should be located. The rights of no private land owner were infringed, because the railroad company acquired by purchase all the property on the shore belonging to private owners, before the works were constructed. There was no unlawful intrusion on the domain of the State, because by the terms of the company's charter it had the right to enter upon and appropriate any lands of the State which were necessary for the purposes above mentioned.

That the charter conferred the right to take land of the State covered by the waters of the lake, was judicially determined by the Supreme Court of Illinois, at the very outset of the company's operations.

Soon after the passage of the ordinance of June 14, 1852, condemnation proceedings were commenced by the company against certain proprietors of land on the shore of the lake north of Randolph street. It was set forth in the petition, that "the railroad had been located and was to be constructed in the

waters of the lake, along the margin of the same, in front of the premises of the said parties, and partly over the same; that the depots, etc., of said railway were to be located in the waters of said lake, and in front of the said property." The county court, in which the petition was filed, refused to entertain the application on the ground, among others, that the company had no power to locate its road in the waters of Lake Michigan. It was also objected, that the property sought to be condemned was not required for the use of the petitioner, but was to be used conjointly by it and the Michigan Central Railroad Company, a foreign corporation having no power to acquire such rights in the State of Illinois. The further objection was urged, that the premises were not required for any use authorized by the charter of the company, but for the purpose of building slips, docks, wharves, basins piers and other structures appertaining to the business of commerce and navigation. An application was then made to the Supreme Court for a mandamus to compel the judge of the county court to take cognizance of the petition. It was decided that the company had the right by its charter to locate the road over the premises in question, the city of Chicago having assented. The objections made were overruled and a peremptory mandamus awarded.

Illinois Central Railroad Co. v. *Rucker*, 14 Ill., 353.

The decision was made at the June Term, 1853, and soon afterwards the company acquired by *purchase* not only the property in question in that proceeding, but all the water lots on the east side of Michigan avenue between Randolph street and the river.

Another important point must not escape observation.

Reference was made in the opening statement to the Act of February 18, 1861, amendatory of the city charter (*ante*, p.

15). In the 64th section of that Act the city ordinance of June 14, 1852, is plainly referred to; and it is there enacted that every owner of a lot fronting on Michigan avenue shall have the right to enjoin the railroad company *and all other persons and corporations from any violation of the provisions of said ordinance*, and, by bill or petition in chancery, *to enforce the provisions of said ordinance.* On the revision of the city charter in 1863 the same law substantially (*ante*, p. 16) was re-enacted. By these enactments the ordinance is not only recognized as valid, but all persons and corporations are prohibited from violating its provisions. There could not be a more effectual ratification. If any doubt could exist before as to the validity of the ordinance, it was completely removed by this legislative action.

The ordinance is still in force, and the contract based upon the ordinance is of perpetual obligation. Not only is the company's title secure to the submerged lands it has actually occupied, but the right of the company to the possession and use of the whole of the strip three hundred feet wide it was authorized to occupy, as against either the city or the *State*, admits of no reasonable question. That the use of the whole is needed to enable the company to manage conveniently and expeditiously its largely increased traffic is not disputed; and the report made by the board of engineers to the Secretary of War in 1882 (*ante* pp. 32, 33), is proof, that it is also needed to develop to the greatest extent the advantages which the proximity of the railroad to the harbor can be made to afford to the general commerce of the country.

It is adjudged in the decree, that if the city could consistently with the charter of the company grant the right, as by the ordinance of 1852 it assumed to do, to use a width of 300 feet from the southern boundary of Lake Park to Randolph

street, the company had elected to appropriate a width of only 200 feet, and cannot now, without further license from proper public authority, appropriate a greater width. (Record, 223.)

Nothing is said upon this point in the opinion of the court; but it is apparent from the decree that doubts were felt whether the permission given by the ordinance to occupy a width of more than 200 feet was consistent with the company's charter. It is believed that on further consideration all doubts on that question will be removed. As before explained, the grants made in the charter were not confined to a way 200 feet in width; as much additional land could be taken as should be required for station grounds, turnouts, etc., necessary for the complete operation of the road. Nor was the use of the three hundred feet in width limited by the ordinance to that of a mere roadway for the passage of trains; works necessary to protect the railroad from the lake were authorized, and the ground could also be used as a yard "for making up and dis-"tributing trains." The ratification of the ordinance by the legislature must also have escaped observation. By this action the ordinance became the act of the State as well as of the city, and no question as to its validity can now be raised by either.

The proof shows that the ordinance was accepted by the railroad company. The company did not immediately occupy all the land described; but the title to land is not lost hy leaving it in its natural state without improvement.

Potomac Steamboat Co. v. *Upper Pot. S. Co.*, 109, U. S. 672, 684.

Boston v. *Lecraw*, 17 How. 426, 436.

Barclay v. *Howell's Lessee*, 6. Pet. 498, 504–5.

The company took possession of so much of the land as was then needed. When more became necessary for the

proper conduct of its business, it attempted to take possession of the rest, and was prevented, not by the interference of the city—for the city did not object (Rec., 402)—but by the action of the War Department which has control of the harbor. (*Ante* pp. 31–34.)

That there was any election by the company to relinquish the right to the additional one hundred feet, or that the company is in any way estopped from claiming its rights against the city and State, is a conclusion, we respectfully submit, not warranted by any evidence in the record.

V. It was conceded in the original information, that the railroad company was rightfully in possession of the strip of land two hundred feet in width between Park Row and Randolph street (Record, 11, 15); and in the last amended information it is alleged (Record, 140) that the *first indication* of any intention to encroach upon the domain of the State, was the procuring of the passage of the ordinances of September 10, 1855 and September 15, 1856, which authorized the taking for railroad uses of the two triangular pieces of ground near Randolph street.

Both of these parcels were covered at the time by the waters of the lake, and have been since filled in by the railroad company. The necessity for the occupation of the ground sufficiently appears from the recitals in the two ordinances (Record, 631–34), and is further explained by the testimony of Mr. Jeffery (Record, 368–9). The strip three hundred feet wide described in the ordinance of 1852, was too narrow at the upper end to admit of convenient access to the passenger-house and freight-yard.

Important conditions were attached to the consent granted by the ordinance of 1855. The company was required to lay out upon its own land a street fifty feet wide west of and

alongside its passenger-house, extending from Randolph street to Water street, and fill the same up its entire length within two years; also to fill up all the space between the railroad tracks and the shore west of the ground described in the ordinance. These conditions were complied with, and the city and public have since had the benefit of these improvements.

The city does not, and obviously cannot, complain of the occupation of these grounds as an encroachment. The State, it is equally clear, has no cause of complaint, because its consent to the appropriation of any land belonging to it, necessary for the complete operation of the railroad, was given in express terms in the company's charter. It was so decided in the court below.

VI. The land which has been recovered from the lake lying west of slip C, between Randolph street and the river, including the slips A and B, was filled in with the consent of the city, granted by the ordinance of 1852, which was afterwards ratified by the legislature. The improvements were made in front of land the company had purchased on the shore. At the side of slips A and B large elevators have been erected, which furnish necessary facilites for the storage of grain brought to Chicago over the railroad, and for the transfer of grain to vessels engaged in lake commerce. (Record, 358, 364–5, 387, 483–6).

In order to provide suitable means for the shipment and delivery of other commodities, slip C and pier C were constructed in 1867; and afterwards piers 1, 2 and 3 were built east of pier C with the approval of the War Department, which had at the time exclusive control of the outer harbor. (*Ante* pp. 27, 29). This license is to be accepted as conclusive evidence that the works do not obstruct the public right of navigation, but are advantageous to the uses for which the har-

bor is designed, and is in itself sufficient to justify their erection.

Pennsylvania v. *Wheeling Bridge Co.*, 18 How., 421.
South Carolina v. *Georgia*, 93 U. S., 4.
Wisconsin v. *Duluth*, 96 U. S., 379.
Boom Co. v. *Patterson*, 98 U. S., 409.
Stockton v. *Baltimore and N. Y. R. Co.* 32 Fed. Rep., 9.
Mississippi Bridge Co. v. *Lonergan*, 91 Ill., 508.

It is not alleged in the information, nor is there any evidence in the record tending to show, that these improvements are injurious to navigation. Wharves and piers in navigable waters are not obstructions, but essential aids to navigation; and where no positive law is violated by their construction, a littoral proprietor on the lake, although the ordinary water line is the boundary of his land (*Seaman* v. *Smith*, 24 Ill., 521), has the right to extend them far enough into the water to enable vessels to lie alongside and receive and discharge cargoes. They are not regarded in law as intrusions upon the public right, but as useful structures calculated to further the public use of the water, and impliedly licensed by the State.

Dutton v. *Strong*, 1 Black, 23.
Railroad Company v. *Schurmeir*, 7 Wall., 272.
Yates v. *Milwaukee*, 10 Wall., 497.
Atlee v. *Packet Company*, 21 Wall., 389.
Barney v. *Keokuk*, 94 U. S., 324.
Cohn v. *Wausau Boom Co.*, 47 Wis., 314.
Clements v. *Burns*, 43 N. H., 617–21.

The judgment of the court below was in consonance with these views; and in this particular the decree is open to no sound objection on the part of the State.

VII. The construction of the new piers north of Randolph street led to the passage of the ordinance of July 12, 1880, providing for the extension of Randolph street and the erection of a viaduct across the railroad tracks to the base of pier 3. (Record, 646–7.)

To accomplish the purpose for which the piers were built, it was necessary that they should be made accessible not only to vessels navigating the lake and to the cars of the railroad company, but also to wagons and teams from the streets of the city. The only safe and convenient access that could be provided for the latter was by a viaduct spanning the railroad tracks. The ordinance was clearly within the powers vested in the city council. By the general law under which the city is incorporated, the council is authorized in express terms "to lay out" and "extend" streets, and "to construct and keep in repair bridges, viaducts, tunnels, and regulate the use thereof." The cost of constructing, maintaining and repairing the viaduct was thrown upon the railroad company, while the right to use it was made "forever free to the public and to all persons having occasion to pass and repass thereon."

The viaduct was built in 1881, in strict accordance with the terms of the ordinance. It has been maintained since by the railroad company, and the use of it has been free to the public. (Record, 371–2.) No part of the structure, except the western approach, is on land which was above water in 1839.

It was rightly held in the court below, that the viaduct is "a "lawful structure erected in conformity to the provisions of "the ordinance legally passed by the city council of Chicago "July 12, 1880."

VIII. The railroad company's title to all the land it had reclaimed from the lake lying east of the west line of the railway in fractional sections ten and fifteen, was confirmed by the Act of April 16, 1869. (*Ante*, p. 21.)

It is important to notice carefully the words of the confirmatory clause in section three of that statute. The right of the company *under the grant from the State in its charter* and the *riparian ownership* incident to *such grant*, in and to the lands which had been appropriated, is explicitly recognized. It was *this* right which the legislature confirmed. If any doubt could have existed before, whether the company acquired title to these lands by virtue of the grant made by the State in the charter, or whether it was entitled to the littoral rights incident to the ownership of land bordering on navigable waters, these questions were settled by that statute. If the title of the company was before imperfect, it was perfected by the statute.

"A confirmation by a law, is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*."

Strother v. *Lucas*, 12 Pet., 411.
Grignon's Lessee v. *Astor*, 2 How., 319.
Ryan v. *Carter*, 93 U. S., 78.
Morrow v. *Whitney*, 95 U. S., 551.

It is adjudged in the decree that the Act of April 16, 1869, "so far, at least, as it confirms the right of the Illinois Central "Railroad Company, under the grant from the State in its "charter . . . and under and by virtue of its appro- "priation, occupancy, use and control, and the riparian owner- "ship incident to such grant, appropriation, occupancy, use "and control in and to the lands, submerged or otherwise, "lying east of the said line running parallel with and four "hundred feet east of the west line of Michigan avenue, in "fractional sections ten and fifteen, is a valid and constitu- "tional exercise of legislative power, and legalizes as well "what was done by said company prior to April 16, 1869, in "the way of filling in the lake and constructing wharves, piers, "tracks, warehouses and other works, between the Chicago

"river and the north line of Randolph street, extended east-
"wardly, as its occupancy and use for way ground of the two said
"triangular pieces of ground immediately south of Randolph
"street; and that the subsequent Act of the general assem-
"bly of Illinois, passed April 15, 1873, in so far as it sought
"by repealing the said Act of April 16, 1869, to revoke or
"annul the confirmatory clause of the last named Act, was
"void under the constitution, both of Illinois and of the United
"States." (Record, 224.)

We do not question the soundness of this judgment. It is manifestly right, so far as it goes; but it is apparent that the effect of the confirmatory clause is much broader than is there stated. The confirmation really covers not only the land north of Randolph street and the triangular pieces of ground referred to, but also the land which the company had reclaimed from the lake south of Randolph street as well; and there is also a distict recognition in the Act of the company's "*riparian* "*ownership* incident to such grant, appropriation, occupancy, "use and control, in and to the lands submerged or otherwise "lying east of the said line running parallel with and four hun-"dred feet east of the west line of Michigan avenue, in frac-"tional sections ten and fifteen."

This suggestion will have an important bearing upon a subsequent point in this brief.

IX. By the same Act a further grant was made to the railroad company in the following terms:

"All the right and title of the State of Illinois in and to
"the submerged land constituting the bed of Lake Michigan,
"and lying east of the tracks and breakwater of the Illinois
"Central Railroad Company, for the distance of one mile
"and between the south line of the south pier extended east-
"wardly and a line extended eastward from the south line of

"lot 21, south of and near to the round-house and machine "shops of said company in the south division of the city of "Chicago, are hereby granted, in fee, to the Illinois Central "Railroad Company, its successors and assigns." (*Ante*, p. 21).

The grant was made subject to these conditions: that the title should be held by the company in perpetuity, and all gross receipts derived from the use of the land, or leasing it, or the improvements made thereon, should form part of the gross proceeds, receipts and income of the company, upon which it should forever pay into the State treasury the seven per centum provided for in its charter; that nothing contained in the Act should authorize obstructions to the Chicago harbor, or impair the public right of navigation, or be held to relieve the railroad company or its lessees from any Act of the general assembly which might be thereafter passed regulating the rates of wharfage and dockage to be charged in the harbor; and if any of the granted lands, or the improvements made thereon, should be leased to, or occupied by, anyone but the railroad company, such property should be subject to municipal and other taxation during the continuance of the leasehold estate, or of such occupancy.

It is manifest that the legislature intended to transfer, by this Act, all the proprietary interest which the State had in the granted premises to the railroad company. The words used in the granting clause are words of present grant, and import an immediate transfer of title. There is no subsequent restraining clause. The language admits, therefore, of no other interpretation.

Schulenberg v, *Harriman*, 21 Wall., 44.
Railroad Company v. *United States*, 92 U. S., 733.
Railroad Company v. *Baldwin*, 103 U. S., 426.

Wright v. *Roseberry*, 121 U. S., 488.
Deseret Salt Company v. *Tarpey*, 142 U. S., 241.

The title of the State became completely extinguished, and the entire estate in the land, subject only to the conditions annexed to the grant, became vested in the railroad company. If this were the only question in the case, no one would think of disputing the title of the grantee. The efficacy of the Act to pass the title is in no way impaired by its subsequent repeal.

X. It is erroneously alleged in the information, that no action was taken by the railroad company with reference to the grant before the Act of 1869 was repealed.

The fact is, the grant was formally accepted, and notice of the acceptance was made a matter of record in the office of the Secretary of State long before the passage of the repealing Act. (*Ante*, pp. 24-5). All the grants made to the company by the Act of 1869 were accepted unconditionally; and in the notice thereof given to the State it was explicitly stated, in compliance with the resolution passed by the board of directors, that the company had commenced work upon the shore of the lake *under the grants referred to.* Possession was taken of the granted land, or so much of it as the United States' authorities in charge of the harbor would permit the railroad company to occupy, and costly improvements were made upon the premises before the repeal.

It was objected in the court below that the formal acceptance was nugatory, because the action was taken at a meeting of the board of directors held in the city of New York. But the objection is untenable. The directors of a corporation may hold their meetings and transact business wherever it may be most convenient, unless prohibited by local legislation or the company's charter or by-laws.

1 Morawetz on Priv. Corp., Sec. 533.
1 Beach on Priv. Corp., Sects. 285, 289.
Galveston Railroad v. *Cowdrey*, 11 Wall, 459.
Handley v. *Stutz*, 139 U. S., 417.
Reichwald v. *Commercial Hotel Co.*, 106 Ill., 439.
Saltmarsh v. *Spaulding*, 147 Mass., 224.

Certainly no one could complain of such action but the corporation or its stockholders; and the stockholders at their annual meeting held in Chicago May 31, 1871—nearly two years before the passage of the repealing act—ratified the resolution of the directors by a unanimous vote. (Ante, p. 25.)

It is, moreover, perfectly well settled that the acceptance of a legislative or other grant to a corporation need not be evidenced by a formal vote or resolution. It may be inferred from other acts, as in the case of private persons. Grants beneficial to a corporation will be presumed to have been accepted on very slight evidence of acquiescence, if nothing appear to the contrary.

Bank of the United States v. *Dandridge*, 12 Wheat., 64, 70–72.
Railway Companies v. *Keokuk Bridge Co.*, 131 U. S., 371, 382.
Rotch's Wharf Company v. *Judd*, 108 Mass., 224.

In the case of a conveyance of land by a deed between private parties, anything which clearly manifests the intention of the grantor and grantee that the instrument shall become operative, is sufficient to pass the title. Although the delivery of the deed be not made to the grantee, but to a stranger, assent and acceptance on his part will be presumed if the deed be for his benefit. His previous efforts to obtain a deed, or his subsequent expressions of satisfaction after having pro-

cured it, are sufficient evidence of acceptance by him, and the deed takes effect from the time it is delivered to the third party for his benefit. The deed does not derive its efficacy as a conveyance from the act of the grantee in accepting, but from the act of the grantor in executing it.

Thompson v. *Candor*, 60 Ill., 244.
Dale v. *Lincoln*, 62 Ill., 22.
Gunnell v. *Cockerill*, 84 Ill., 319.
Concord Bank v. *Bellis*, 10 Cush., 276, 278.
Brooks v. *Marbury*, 11 Wheat., 78, 97.
Grove v. *Brien*, 8 How., 429, 440.
United States v. *Schurz*, 102 U. S., 378.
2 Morawetz on Priv. Corp., Sects. 629, 708a.
Angell and Ames on Corp., Sec. 173.

It is not pretended that there is the slightest evidence of any refusal by the company to accept the Act of 1869; nor are any equivocal words or conduct shown on the part of its directors or other agents, which indicate that the company was hesitating or undecided as to its final action. A plan for the construction of wharves upon the submerged lands was prepared as early as May, 1869, which was in part executed; and the failure to complete the work is attributable solely, as the evidence shows, to the refusal of the War Department to permit any improvements to be made by the company in front of the public ground between Randolph street and Park Row, until the question of title should be settled. On the 12th of July, 1869, the first installment of the $800,000 required to be paid to the city for the land granted to the three railroad companies as a site for a passenger depot, was paid to the city comptroller. In the autumn of 1869 work was commenced on pier No. 1, adjacent to the river, which was interrupted July 3, 1871, by an injunction obtained by the U. S. District Attorney, but resumed immediately after the dissolution of the

injunction, January 16, 1872. In 1870 the new line of breakwater was constructed between Twelfth street and Fourteenth street; and a large part of the triangular space outside the breakwater of 1869, north of the south line of Monroe street, marked on the Morehouse map "Built 1873," was filled with earth, prior to the passage of the repealing Act. Between the date of the passage of the Act of 1869 and its repeal in 1873, more than $200,000 was expended by the company upon the submerged lands included in the grant; and it is shown that the company was active during the same period in trying to obtain the consent of the War Department to the construction of wharves south of Randolph street.

These acts can be accounted for only upon the supposition that the act of 1869 had been accepted by the company, and, in the absence of any countervailing proof, are in themselves conclusive evidence of such acceptance.

XI. The repeal of the Act of April 16, 1869, did not divest the title which had become vested in the railroad company. Private rights which have vested under a legislative Act are not affected by a repeal of the law, and cannot be annulled by subsequent legislation. A State does not possess the power of revoking its own grants.

It has been for more than eighty years the settled doctrine of this court, that a grant of land made by a State and accepted by the grantee is an executed contract, within the protection of that clause of the constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

Fletcher v. *Peck*, 6 Cranch, 87.

It appeared in the case cited, that a tract of land had been conveyed by the governor of Georgia under the authority of

an Act of the legislature, which was subsequently repealed. The grantees had conveyed the property to purchasers for a valuable consideration before the repeal, but the principle on which the case was decided was independent of that circumstance. The opinion of the court was delivered by Chief Justice MARSHALL. "The principle asserted is," says the Chief Justice, "that one legislature is competent to repeal any "Act which a former legislature was competent to pass; and "that one legislature cannot abridge the powers of a succeed-"ing legislature. The correctness of this principle, so far as "respects general legislation, can never be controverted. *But* "*if an act be done under a law, a succeeding legislature can-*"*not undo it.* The past cannot be recalled by the most ab-"solute power. Conveyances have been made, these convey-"ances have vested legal estates, and if these estates may be "seized by the sovereign authority, still, *that they originally* "*vested is a fact, and cannot cease to be a fact.* When, then, a "law is in its nature a contract, when absolute rights have vested "under that contract, a repeal of the law cannot divest those "rights; and the act of annulling them, if legitimate, is ren-"dered so by a power applicable to the case of every individ-"ual in the community. . . . The Constitution of the "United States declares that no State shall pass any bill of at-"tainder, *ex post facto* law, or law impairing the obligation of "contracts. Does the case now under consideration come "within this prohibitory section of the Constitution? In con-"sidering this very interesting question, we immediately ask "ourselves, what is a contract? Is a grant a contract? A con-"tract is a compact between two or more parties, and is either "executory or executed. An executory contract is one in "which a party binds himself to do, or not to do, a particular "thing; such was the law under which the conveyance was "made by the Governor. A contract executed is one in "which the object of contract is performed; and this, says

"Blackstone, differs in nothing from a grant. The contract "between Georgia and the purchasers was executed by the "grant. A contract executed, as well as one which is execu- "tory, contains obligations binding on the parties. A grant, "in its own nature, amounts to an extinguishment of the right "of the grantor, and implies a contract not to reassert that "right. A party is, therefore, always estopped by his own "grant. Since, then, in fact, a grant is a contract executed, "the obligation of which still continues, and since the Con- "stitution uses the general term contract, without distinguish- "ing between those which are executory and those which are "executed, it must be construed to comprehend the latter as "well as the former. A law annulling conveyances between "individuals, and declaring that the grantors should stand "seized of their former estates, notwithstanding those grants, "would be as repugnant to the Constitution as a law discharg- "ing the vendors of property from the obligation of executing "their contracts by conveyance. It would be strange if a con- "tract to convey was secured by the Constitution, whilst an "absolute conveyance remained unprotected."

The question whether grants made by the *State* are excluded from the operation of the constitutional provision is next considered; and it was held, that as the words are general and contain no such distinction, the prohibition extends to contracts made by the State as well as to those of private persons.

That decision has never been questioned in this court. *Fletcher* v *Peck* is a leading case, which has been steadily followed in both the State and Federal courts. In *Von Hoffman* v. *City of Quincy*, 4 Wall., 550, it is said that the principles which it maintains "are now axiomatic in American jurispru- "dence, and are no longer open to controversy."

Other authorities to the same effect, to which the attention of the court is respectfully called, are:

Terrett v. *Taylor*, 9 Cranch., 43.

Davis v. *Gray*, 16 Wall., 203.
Hall v. *Wisconsin*, 103 U. S., 5.
Franklin County Grammar School v. *Bailey*, 62 Vt., 467.
See also: Cooley's Const. Lim., 275.

In *Terrett* v. *Taylor*, it was again decided by this court that a legislative grant or confirmation of land vests an *irrevocable* title. "We have no knowledge," say the court, speaking through Mr. Justice STORY, "of any authority or principle "which would support the doctrine that a legislative grant is "revocable in its own nature, and held only *durante bene* "*placito*. Such a doctrine . . . is utterly inconsistent "with a great and fundamental principle of a republican gov- "ernment, the right of the citizens to the free enjoyment of "their property legally acquired. . . . A private corpora- "tion created by the legislature may lose its franchises by a "*misuser* or a *nonuser* of them; and they may be resumed by "the government under a judicial judgment upon a *quo warranto* "to ascertain and enforce the forfeiture. . . . But that "the legislature can repeal statutes creating private corpora- "tions, or confirming to them property already acquired under "the faith of previous laws, and by such repeal can vest the "property of such corporations exclusively in the State, or "dispose of the same to such purposes as they may please, "without the consent or default of the corporators, we are not "prepared to admit; and we think ourselves standing upon "the principles of natural justice, upon the fundamental laws "of every free government, upon the spirit and letter of the "Constitution of the United States, and upon the decisions of "most respectable judicial tribunals, in resisting such a doc- "trine."

In *Davis* v. *Gray*, it was held, where lands had been granted by the State to a railway company, that a subsequent enact-

ment declaring the lands forfeited, the company being in no default, was a mere nullity. That the Act of incorporation and the land grant were contracts, and as such within the protection of that clause of the Constitution of the United States which prohibits a State from passing a law impairing the obligation of contracts, is, it is said, "too well settled in this court "to require discussion." This is made more emphatic by what follows: "When a State becomes a party to a contract, as in "the case before us, the same rules of law are applicable to "her as to private persons under like circumstances. When "she or her representatives are properly brought into the "forum of litigation, neither she nor they can assert any right "or immunity as incident to her political sovereignty."

In *Hall* v. *Wisconsin*, it was held, that a contract between a State and a private person for the performance of certain duties for a specific period at a stipulated compensation, is within the protection of the Constitution. The court say: "When a State descends from the plane of its sovereignty and "contracts with private persons, it is regarded *pro hac vice* as "a private person itself, and is bound accordingly."

In *Franklin County Grammar School* v. *Bailey*, it was held, where lands had been granted by an Act of the legislature to a county Grammar School, which had been some years before incorporated, no right having been reserved to alter or repeal the Act, that a subsequent statute placing the lands under the charge of certain town officers and appropriating the rents to the support of another school, in which a grammar school department was to be maintained, was void as impairing the obligation of a contract. Even if the grant was without consideration, it was an executed gift and could not be recalled. But by accepting it, the grantee took upon itself the duty of leasing and caring for the lands and collecting and applying the rents to the purposes specified in the grant, and this, in the

opinion of the court, was ample consideration, if a consideration was required.

To these authorities might be added the multitude of cases in which it is held that a grant of corporate rights and franchises, accepted by the grantee, is a contract which cannot be impaired by subsequent legislation. Corporations acquire all such rights by virtue of grants from the State. When accepted, they become vested rights and cannot be resumed at the pleasure of the State. They may be forfeited for misuser or nonuser, but only by trial and judgment in due course of law. There is no distinction in law as to the effect of such grants and a grant of *land* made by the State to a private corporation. The State incurs the same obligation in both cases. There can be no ground on which the contract in the one case can be infringed, which will not equally justify the same usurpation of power with regard to the other.

The title acquired under the Act of 1869 could not be annulled by the repeal of the Act, for the additional reason that no State can deprive any person of property without due process of law.

It was said by Chief Justice MARSHALL in *Fletcher* v. *Peck*, "that it may be well doubted whether the nature of "society and of government does not prescribe some limits to "the legislative power." When once a State has conveyed its interest in a tract of land, which it owns, to an individual, the land becomes private property. The State has parted with the control over it, and the grantee immediately succeeds to all the rights of ownership. It is as truly his property as if the title had been derived from another source. The legislature has no more right to interfere with his enjoyment of it, than it has to interfere with the rights of other land-owners. It may make the grant on such conditions as it pleases, and

can enforce their performace; but it can no more rightfully recall the grant, without the consent or default of the grantee, than it can seize arbitrarily upon lands which it never owned.

The right to acquire property, and to be secure in the enjoyment of it when lawfully acquired, has been placed beyond legislative encroachment everywhere in the United States. In some form of words, the constitution of every State contains a provision, that "no person shall be deprived of life, "liberty or property, without due process of law"; and since the adoption of the Fourteenth Amendment in 1868, the same check on the abuse of legislative power has been provided by the Constitution of the United States.

That railroad corporations are within the purview of this provision is settled by repeated decisions of this court.

Santa Clara County v. *Southern Pac. R. R. Co.*, 118 U. S. 394.
Minneapolis Ry. Co. v. *Beckwith*, 129 U. S. 26.
Railroad Company v. *Gibbes*, 142 U. S. 386.

The Act of April 16, 1869, was repealed on the 15th of April, 1873. During the intervening period of four years the title to the land in controversy was vested in the railroad company. The company still holds the title, unless it shall be held that the repealing Act was "due process of law."

XII. It is assumed in the opinion of the court below, that the only object of the legislature in making the grant of the submerged land was to enable the railroad company to construct an outer harbor, and to build, maintain, and lease wharves and docks for the use of shipping; that the railroad company, being interested to some extent in the accomplishment of that object was selected as an agency of the State to undertake the work, and was for that purpose given such an enlargement of its original powers as would enable it to enter

upon and complete it; that the Act imposed on the company no duty or obligation that was enforcible by legal proceedings; and that the grant was in legal effect a mere license, for which nothing was paid, and which it was competent for the State to revoke, if upon considerations of public policy it should think best not to intrust the work to such an agency, provided the company was not deprived without compensation of the use of improvements made distinctly upon the faith of the grant. (Rec., 215–218.)

It is submitted, with great deference, that in this view of the subject there is a clear misapprehension of the legal effect of the Act of April 16, 1869.

It is no doubt true, that the legislature expected that the railroad company would improve the land by the construction of wharves, upon which tracks could be laid to enable cars and vessels to lie side by side, and that by necessary implication power was conferred upon the company to make such improvements. The land was covered by water, and in that state was not fit for the uses to which dry land can be applied. The Act certainly contemplated that the land was to be converted to profitable use by the railroad company, that improvements would be made upon it, and that a revenue would be derived from the use of the land and also from leases. It was made an express condition of the grant that seven per cent. of all such revenue should be paid into the State treasury. The State also reserved the right to regulate the rates of wharfage and dockage to be charged in the harbor.

But it is equally clear, that the use to be made of the land and the character and extent of the improvements to be put upon it, were left wholly to the discretion of the railroad company, subject to but one restriction: that nothing contained in the Act should "authorize obstructions to the Chicago harbor, "or impair the public right of navigation." There was no

requirement that the company should construct a harbor. The only obligations imposed upon the grantee were, that it "should "hold the fee of said lands in perpetuity," and pay into the state treasury a certain proportion of the gross receipts derived from the use or leases of the property aud the improvements which might be made upon it. The company was left free to make any lawful use of the land it should deem expedient, subject only to the restriction above mentioned. The assumption, therefore, that the only object of the legislature in passing the law was to make provision for an outer harbor, is clearly inadmissible. The principal inducement manifestly was to obtain an augmentation of the revenues, already exceedingly large, derived by the State from the Illinois Central Railroad Company. The granted land, in the condition in which it then was, was of no use to anybody and had no appreciable value. The State derived no income from it, and the shallow waters of that portion of the lake were of no practical use for purposes of navigation. But the land was so situated that it might be made useful and valuable by the expenditure of sufficient money. Portions of it were needed for actual use by the railroad company—its terminal grounds in Chicago could be extended in no other direction. That corporation sustained peculiar relations to the State, and the *main* object of the legislature in ceding to it this waste tract of submerged land presumably was, to supply necessary facilities for handling its traffic, and to induce the company to improve the property and make it a source of permanent income to the public treasury.

But admit, for the purpose of the argument, that there was another object, namely, the construction of an outer harbor, and let us suppose this object to have been definitely expressed in the Act: It could avail nothing in support of the repealing statute. In no view of the case can it be main-

tained that the company was employed merely as an agency of the State to make the improvement. It had a beneficial interest in the property; the improvements made upon it would belong to it and not to the State. It had the exclusive power to manage the estate, to make leases at its own discretion, to receive the income, and, after paying the stipulated per centage to the State, to appropriate the residue to its own use.

The Illinois Central Railroad Company, although it has public duties to perform, is not a public corporation. Property acquired by it is in no sense public property, nor is a contract between it and the State less obligatory upon both parties than one made by the State with a private citizen. In accepting the grants made by the State in 1869, the company assented to the conditions expressed in the Act, and the State has the right to insist upon performance of them; but it can require nothing more. Both parties are bound by the terms of the contract, the State as effectually as the railroad company. If the obligations assumed by the latter should not be performed in good faith, the law affords an adequate remedy. Even if there were sufficient cause of forfeiture, the grant could be revoked or vacated only by trial and judgment in due course of law.

The further suggestion that the Act of 1869 was in legal effect a mere license, revocable at any time before the contemplated improvements were completed, at the pleasure of the State, is equally inadmissible. A license is merely an authority to do something upon another's land granted to a person holding no estate therein. The Act of 1869 contains no language which conveys the idea of a mere license, nor anything to indicate that this was at all in the minds of those who framed and passed it. There is no obscurity in the terms, nor any room for doubt as to the intention of the legislature. The oper-

ative words are: "All the right and title of the State of Illi-"nois in and to the submerged lands" described "are hereby "granted, in fee, to the Illinois Central Railroad Company, its "successor and assigns." Next follows the provision, that "*the fee to said lands shall be held by said company in perpetu-*"*ity.*" To construe these words as a mere license to enter and construct public works upon land belonging to the State, is obviously impossible. The title to the land became vested by the grant in the railroad company.

The question whether the grant was founded upon a valuable consideration, or whether it was a pure donation, is not material. It is competent for an owner of property, who is under no legal disability, to dispose of his estate as he pleases, if no fraud be committed upon his creditors. He may convey it for charitable or public uses, or he may give it away to any one he chooses without consideration. A deed properly drawn and executed by the grantor as a voluntary gift, will pass the title to the grantee as effectually as if made for a valuable consideration. A want of consideration, in the absence of fraud, is no ground of avoiding a deed. Executory contracts require a valuable consideration to sustain them. But a gift of land or other property completely executed is irrevocable. The thing conveyed becomes the property of the donee, and no subsequent change of mind on the part of the donor will enable him to resume the title. These principles are not less applicable to transactions between the State and its grantees than to those between individuals. A donation made by law is certainly no less valid than a gift *inter partes.*

In *Farrington* v. *Tennessee*, 95 U. S., 683, it is said: "Con-"tracts are executed or executory. A contract is executed "where everything that was to be done is done, and nothing "remains to be done. A grant actually made is within this "category. Such a contract requires no consideration to sup-

" port it. A gift consummated is as valid in law as anything " else. *Dartmouth College* v. *Woodward*, 4 Wheat., 518."

But the grant in this case was not a mere gratuity. There was a sufficient consideration to sustain even an executory contract. The State was to receive a pecuniary equivalent for the lands granted. The undertaking by the railroad company to hold the title in perpetuity, and to pay forever into the State treasury seven per cent. annually of the gross receipts derived from use or leases of the property and the improvements put upon it, was a valuable consideration in the strictest legal sense. If any consideration was required to support the grant, it is found in this express obligation imposed by the legislature and accepted by the grantee, which is of perpetual duration. And this obligation has been placed by a provision of the constitution of the State of Illinois, enacted since the Act of 1869 was passed, beyond the control of the legislature. (*Ante* p. 42).

XIII: In the cross-appeal taken by the State it is assigned for error, that the court below sustained the validity of the Act of April 16, 1869.

Two objections have been raised to the validity of the Act, which it is necessary to consider.

1. It is objected that the requisite constitutional forms were not observed by the legislature in passing the Act.

The constitution of 1848, in force at the time, provided (Art. 3, Sec. 23) that " every bill shall be read on three different " days, in each house, unless, in case of urgency, three-fourths " of the house where such bill is so depending shall deem it " expedient to dispense with this rule." It also provided (Art. 3, Sec. 13), that " each house shall keep a journal of its pro- " ceedings, and publish them."

The particular objection urged is, that the journal of the

Senate does not show that the bill was read on three different days in that body, nor that the rule was dispensed with by a vote of three-fourths of its members.

The constitution does not expressly require that the three several readings shall be entered on the journals; but it *is* expressly provided (Art. 3, Sec. 21), that "on the final passage "of all bills the vote shall be by ayes and noes, and shall be "entered on the journal; and no bill shall become a law with- "out the concurrence of a majority of all the members elect "of each house."

The Act in question, properly authenticated by the presiding officers of the two houses, was published by the Secretary of State in the volume of public laws of 1869, with his official certificate appended, as required by law. (Laws 1869, 245–248, 411; Gross Stat. 1868, 415, 515–517).

Whether an Act, thus attested and authenticated, is not in itself conclusive evidence that all necessary constitutional forms were observed in the course of its passage; or whether it is competent to show from the journal of either house, for the purpose of invalidating the Act, that some of those forms were omitted, are questions on which there is in the State courts some diversity of opinion.

It has always been held in England that the enrolled Act imports absolute verity, and, therefore, cannot be questioned; and this is the prevailing rule in this country.

Field v. *Clark*, 143 U. S., 649.

But in Illinois, in consequence of the special constitutional provisions relating to legislative proceedings, a different rule has been adopted. It is there held, when the validity of a statute is drawn in question, that it is competent for the court to examine the journals to ascertain whether it was legally passed. The burden of proof, however, is upon the party

assailing the law. *Prima facie*, an Act properly verified is a valid law, of which the court must take judicial notice. To overcome that presumption, the evidence, it is held, must be clear and convincing. It is by no means sufficient to raise a doubt. It must be clearly proved that the requirements of the constitution were not observed. If the journals are lost or destroyed, the presumption that the proceedings were regular will sustain the law.

Spangler v. *Jacoby*, 14 Ill., 297.
Larrison v. *P. A. & D. R. R. Co.*, 77 Ill., 12.
People v. *Loewenthal*, 93 Ill., 192.

The subject has been considered by this court, and it was held in the earliest case by a bare majority of the judges, but not without strong expressions of dissent from the minority, that the rule established in the State courts of Illinois should be followed by the Federal courts in Illinois cases.

Town of South Ottawa v. *Perkins*, 94 U. S., 260.

The same rule has been recognized in two subsequent cases, in which it was also held that the court will take judicial notice of the journals, and that copies of the journals, certified by the Secretary of State, and the printed journals, published in obedience to law, are both competent evidence of the proceedings of the legislature.

Walnut v. *Wade*, 103 U. S., 683.
Post v. *Supervisors*, 105 U. S., 667.

It appears in this case, that the original journals of the two houses, for the legislative session of 1869, are not on file in the office of the Secretary of State, and have not been preserved. What are there known as the House and Senate journals of the twenty-sixth General Assembly, consist of five bound volumes in manuscript, supposed to have been copied from the original

journals. The original journals themselves were deposited in the Secretary's office at the close of the session, and were afterwards sent to the public printer and never returned. (Rec., 167–171.)

On the 26th of March, 1869, a law was enacted (Laws of 1869, p. 48), which provided that thereafter the copying of the journals of each General Assembly should be done under the personal supervision of the Secretary of State, and that *in no case should he permit the originals to be taken out of his office.* It seems that this law, which took effect from its passage, was disregarded. The tradition in the office is, that after the journals were printed they were disposed of as waste paper. (Rec., 169.)

The certified copy of the House and Senate journals, or of so much of the same as relates to the passage of the Act in question, which was put in evidence by the Attorney General (Rec., 551–578), was made from the five bound volumes in manuscript now on file in the Secretary's office. This was supplemented by a further transcript of a portion of the proceedings, also certified by the Secretary of State (Rec., 171, 172); and it was stipulated by counsel for the respective parties that upon the final hearing of the cause in the Circuit Court, or upon the hearing of any appeal in the Supreme Court, either party might refer to the *printed* journals with the same effect as if they had been formally introduced in evidence and incorporated in the record. (Rec., 517.) A transcript from the printed journal was also offered in evidence and made a part of the record. (Rec., 521.)

So far as relates to the present question, there is no important discrepancy between the *printed* journal of the Senate and the transcript produced from the Secretary of State's office. The journals show that the bill was introduced in the House of Representatives January 13, 1869. It was known

as " House Bill No. 373." It passed the House February 20, 1869, and on the same day was sent to the Senate.

The proceedings of the Senate, as shown by the journal, are in substance as follows: The bill was received from the House February 20, 1869. (Record, 574.)

Monday, February 22. The bill was taken up and read a first time. A motion was made that the bill be laid on the table until July 4th, which was lost by a vote of yeas 11, nays 14. It was moved that the bill be ordered to a second reading, which motion was carried by a vote of yeas 15, nays 10. On motion, the bill was laid on the table for the purpose of printing, and two hundred copies ordered printed.

Wednesday, February 24. A motion was made that the bill be taken from the table and referred to a committee, which was carried by a vote of yeas 17, nays 7. On motion, the bill was referred to the committee on the judiciary.

Monday, March 1. The bill was reported from the committee on the judiciary, with a recommendation in favor of its passage. The report of the committee was concurred in and the bill ordered to a third reading. A motion was made to reconsider the last vote.

Friday, March 5. The bill was made the special order for Saturday, March 6, at ten o'clock a. m.

Saturday, March 6. The consideration of the bill was postponed, and made a special order for Monday, March 8, at ten o'clock a. m.

Monday, March 8. The motion to reconsider the vote ordering the bill to a third reading was laid on the table, yeas 14, nays 11. The bill was read a third time; and the question being put " shall this bill pass? " it was decided in the affirmative, years 14, nays 11. The names of those voting on each side are entered on the journal. Ordered that the title be as aforesaid, and that the secretary inform the House of Rep-

resentatives thereof. A motion was made to reconsider the vote by which the bill was passed, which motion was laid on the table by a vote of yeas 14, nays 11.

Wednesday, March 10. The bill was reported to have been correctly enrolled, and to have been laid before the Governor on the 9th of March for his approval.

Friday, April 16. The bill was returned from the House of Representatives, with a message that the Governor had returned the bill to that house with his objections, and that after reconsidering the bill a majority of the members elected to the House had agreed to pass the same notwithstanding the objections of the Governor. The bill was taken up, and the question being "shall this bill pass notwithstanding the objections of "the Governor?" it was decided in the affirmative, yeas 14, nays 11. The names of those voting on each side are entered on the journal. Ordered that the title be as aforesaid, and that the secretary inform the House of Representatives thereof. (Rec. 574–578).

It should be stated in explanation of this final action, that the constitution of 1848, then in force, provided (Art. 4, Sec. 21) that "every bill which shall have passed the Senate and "House of Representatives shall, before it becomes a law, be "presented to the Governor; if he approve, he shall sign it; "but if not, he shall return it, with his objections, to the house "in which it shall have originated; and the said house shall "enter the objections at large on their journal, and proceed "to reconsider it. If, after such reconsideration, a majority of "the members elected shall agree to pass the bill, it shall be "sent, together with the objections, to the other house, by "which it shall likewise be reconsidered; and if approved by "a majority of the members elected, it shall become a law, "notwithstanding the objections of the Governor; but in all "such cases the votes of both houses shall be determined by

"yeas and nays, to be entered on the journal of each house; "respectively."

The Senate at that time consisted of 25 members, and the House of Representatives of 85 members. (Constitution of 1848, Art. 3, Sec. 6; Laws of 1861, pp. 16-22.)

The question to be decided is, whether it clearly appears from the journal of the Senate that the bill was not read a second time in that body, and that the rule requiring a second reading was not dispensed with by the requisite vote?

It will be observed that the bill was ordered to a second reading on the 22d of February. Nothing appears on the journal to show that the rule was not dispensed with and the bill read a second time on that day. The journal is silent as to whether any action was taken upon the bill on the 23d of February. On the 24th, the bill was referred to a committee. It would at that time have been in order to read the bill a second time, without a suspension of the rule, if it had not been done already; and it does not appear from the journal that this action was not taken. The rules of the Senate then in force have been put in evidence, one of which provided that "no bill shall be committed or amended until it shall have been twice read." (Rec., 517.) The presumption, therefore, is, in the absence of evidence to the contrary, that the bill was read a second time before it was referred to the committee. On the 8th of March the bill, as the journal affirmatively shows, was read a *third* time. This imports that it had been previously read twice; and the implication cannot be overcome by the failure of the clerk to record a fact which was not required to be entered on the journal.

The precise question here raised was passed upon by the Supreme Court of Illinois in 1860. The judgment of the court was delivered by Chief Justice CATON, who thus disposes of the objection: "It is objected that the Senate journal does not

"show that the bill was read three times in that body before "it was put upon its final passage, and that hence the consti- "tutional requirements to make it a law were not observed. "The constitution does require that every bill shall be read "three times in each branch of the General Assembly before "it shall be passed into a law, but the constitution does not say "that these several readings shall be entered on the journals. "Some acts performed in the passage of laws are required by "the constitution to be entered on the journals in order to "make them valid, and among these are the entries of the ayes "and nays on the final passage of every bill, and we held in "the case of *Spangler* v. *Jacoby*, 14 Ill., 297, that where the jour- "nal did not show this, the act never became a law. But where "the constitution is silent whether a particular act which is "required to be performed shall be entered on the journals, it "is then left to the discretion of either house to enter it or not, "and the silence of the journal on the subject ought not to be "be held to afford evidence that the act was not done. In "such a case we must presume it was done, unless the journal "affirmatively shows that it was not done. We think this act "was properly passed by both houses of the General Assem- "bly, and when approved by the Governor it became a law."

Supervisors of Schuyler County v. *The People*, 25 Ill., 181.

This decision is referred to with approval in a subsequent case in the same court decided in 1865. The following is an extract from the opinion of the court, delivered by Chief Justice WALKER: "If, upon an inspection of a bill, it is found to "be duly authenticated, and the journals show that it passed "both houses by the number of votes required by the consti- "tution, and the ayes and noes are entered upon the journal, "courts will, if a public law, regard and act upon it as such. " . . . Some acts must appear by the journals to have

"been performed, as well as the proper authentication upon "the bill, before it can be regarded as a law of the land. "Everything which the constitution has required to be entered "upon the journals, in the progreas of a bill through the two "houses, is essential to its binding force, and must appear from "the journals to have been performed. Other acts required "to be done by the two houses, but not required to be "spread upon the journals, will be presumed to have been "done, when a statute appears in other respects to be regular, "unless the contrary appears from the journals themselves. "*Supervisors* v. *The People*, 25 Ill., 181. Such was the rule "adopted in that case, and we see no reason for departing "from it."

Wabash R. R. Co. v. *Hughes*, 38 Ill., 186.

The other Illinois cases, in which the court has referred to the journals to ascertain whether bills were constitutionally passed by the legislature, are cited below. In neither of these cases has the decision in *Supervisors of Schuyler County* v. *The People* been disapproved.

Spangler v. *Jacoby*, 14 Ill., 297.
Turley v. *County of Logan*, 17 Ill., 151.
Prescott v. *Trustees of Illinois and Michigan Canal*, 19 Ill., 324.
The People v. *Starne*, 35 Ill., 121.
The People v. *De Wolf*, 62 Ill., 253.
Ryan v. *Lynch*, 68 Ill., 160.
Miller v. *Goodwin*, 70 Ill., 659.
Larrison v. *Peoria, Atlanta & Decatur R. R. Co.*, 77 Ill., 12.
The People v. *Loewenthal*, 93 Ill., 192.
Wenner v. *Thornton*, 98 Ill., 156.
Burritt v. *Commissioners*, 120 Ill., 322.

Numerous decisions in other States are in accord with the leading Illinois case above referred to.

Miller v. *The State*, 3 Ohio St., 475.
McCulloch v. *The State*, 11 Ind., 424.
The State v. *City of Hastings*, 24 Minn., 78.
English v. *Oliver*, 28 Ark., 317.
Chicot County v. *Davies*, 40 Ark., 200.
The State v. *Francis*, 26 Kan., 724.
In re Vanderburg, 28 Kan., 243.
The State v. *Mead*, 71 Mo., 268.
Attorney General v. *Rice*, 64 Mich., 385.
See also: Cooley Const. Lim., 135, 139.

In Re Duncan 139 U.S. 449

Objection was also made in the court below to the action taken on the bill in the House of Representatives.

It appears from the journal that the bill was introduced in the House January 13, 1869. It was then read a first time and ordered to a second reading. The rule having been dispensed with, the bill was read a second time on the same day, and referred to a committee. On the 4th of February the committee "reported the same back with amendments, and "recommended its passage." (Rec., 552.) On the 10th of February these amendments were concurred in, and further amendments were offered and adopted. The bill as amended was then ordered to be engrossed for a third reading. (Rec., 553–559.) On the 18th of February the bill was reported to have been correctly engrossed, (Rec., 559), and on the 20th of February it was read a third time and passed. The vote on its passage was taken by yeas and nays and entered on the journal. (Rec., 560.) The point urged was, that important changes were made in the bill by the amendments reported from the committee; and that the blll as passed was not read three times in the House.

The journal does not show what the amendments were,

which were reported by the committee; nor is there any evidence in the record which supplies the omission. Indeed, no extraneous evidence would be admissible. It is held in Illinois, that to invalidate a law on the ground that the requirements of the Constitution had not been complied with in its passage, the fact must be shown by the journals. In no other mode can the court be properly advised.

Happel v. *Brethauer*, 70 Ill., 166.
Illinois Central R. R. Co. v. *Wren*, 43 Ill., 77.

The fact that the amendments in question were acted upon without objection and adopted by the House, is conclusive evidence of the regularity of the proceedings. Whether they were many or few, radical or slight, is wholly immaterial. The requirement that bills shall be read three times does not apply to amendments.

The People v. *Wallace*, 70 Ill., 680.

Attention should perhaps be called to the fact, that in the copy of the House journal produced from the Secretary of State's office, a palpable clerical error has been detected in the record of proceedings on the fifth of April. (Rec., 573.)

The bill, having passed both branches of the General Assembly, was returned by the Governor, with his objections, to the House of Representatives where it originated, on the 14th of April. The objections were entered at large upon the journal (Rec., 561, 573,) and on the next day (April 15) the House proceeded to reconsider the bill. The subsequent proceedings on that day, as shown by the amended transcript of the journal obtained from the Secretary of State's office, are as follows:

" A bill (H. B. No. 373) for ' An Act in relation to a por
" tion of the submerged lands and lake-park grounds, lying on
" and adjacent to the shore of Lake Michigan, on the eastern

"frontage of the city of Chicago,' was taken up, and the "House proceeded to a reconsideration thereof. Pending "which, the speaker announced that the hour of adjournment "as fixed by resolution, had arrived, and declared the House "adjourned until 7 o'clock P. M.

"7 o'clock P. M.

"The consideration of S. B. No. 373, was resumed. On "motion of Mr. Dinsmoor, a call of the house was ordered, "and the following members answered to their names: (here "follow the names—present, 73.) A quorum being present, "all further proceedings under the call were dispensed with. "And the question being 'Shall this bill pass, the objections "of the Governor to the contrary notwithstanding?' It was "decided in the affirmative—yeas 52, nays 31. Those voting "in the affirmative are: (here follow the names.) Those "voting in the negative are: (here follow the names.) Or-"dered that the clerk inform the Senate thereof." (Rec., 171, "172.)

It will be observed that the House was engaged in the consideration of the bill when the hour of adjournment arrived. When the House convened again at 7 o'clock, the consideration of the same subject was resumed, but, by a clerical error, the entry on the journal is: "The consideration of S. B. No. 373" (instead of H. B. No. 373), "was resumed." The question (after a call of the House) was then put upon the passage of the bill, which was decided in the affirmative on a call of the yeas and nays.

It may be urged, that in consequence of this clerical mistake, there is no evidence in the journal that House Bill No. 373, which is the bill in question in this case, was passed in the House over the Governor's veto. There is, however, no such imperfection in the *printed* journal. The printed journal of the proceedings of the House on the 15th of April will be found on page 521 of the printed record. The first entry

in that journal, after the resumption of business at 7 o'clock, is this: "The consideration of House Bill No. 373 was resumed"; and there can be no doubt whatever of the accuracy of this record. It appears from the printed journals of that session that Senate Bill No. 373 was a "Bill for an Act to enable the "County of Clark to fund certain indebtedness." The proceedings of the two houses in relation to that bill will be found on pages 518–520 of the printed record. The bill was introduced in the Senate January 22, 1869, and passed on the 8th of February. It was sent to the House February 9th, and there read a third time and passed on the 8th of March. It was presented to the Governor, for his approval, on the 19th of March, and on the 14th of April a message was received from him that he had approved the bill. The act is published in volume 2, Private Laws of 1869, page 308, and it appears there to have been approved March 29, 1869. (Rec., 516.)

It is manifest from these facts, that the record in the copy of the House journal on file in the Secretary of State's office, is erroneous. Such a clerical error, if found in the original journal, could mislead or deceive no one, and would not, therefore, be magnified into importance by the courts.

Walnut v. *Wade*, 103 U. S., 683, 691.

Larrison v. *Peoria, Atlanta and Decatur R. R. Co.*, 77 Ill., 12.

These objections have been noticed at greater length than would have been deemed admissible, in view of the very full and judicious treatment of the subject in the opinion of the Circuit Court, (Rec., 203–206), had it not been thought that a succinct statement of the facts on which they are based, and which are found scattered in various places throughout a very voluminous record, would be of assistance to the court.

2. It is further objected that the Act of April 16, 1869, is repugnant to the clause of the constitution of 1848, which provides (Art. 3, Sec. 23), that "no private or local law which "may be passed by the general assembly, shall embrace more "than one subject, and that shall be expressed in the title."

The question here raised is very fully considered in the opinion of the court below, (Rec., 206–212), and it is scarcely important to fortify reasoning so abundantly strong. But there is one point on which perhaps something more may be appropriately said.

The first inquiry suggested is, whether the Act of 1869 is a private or local law within the meaning of the above regulation?

That it is not *private*, must be conceded. The last section reads as follows: "Sec. 8. This Act shall be a public Act, "and in force from and after its passage." (Rec., 637.) And generally all enactments which directly affect public interests are held to be public. A statute which concerns the public revenue is a public statute.

Unity v *Burrage*, 103 U. S., 447, 454-5.
Binkert v. *Jansen*, 94 Ill., 291.
The People v. *Wright*, 70 Ill., 398.
Sedgwick on Stat. and Const. Law, 25-6.
Potter's Dwarris on Statutes, 53.
1 Black. Com., 86.

It is also a general Act, and not "local," in the legal sense of that term. A statute is general, if it directly affects the interests of the State at large, or relates to the property of the State or the public revenue. Local laws are such as are confined in their operation and effect to a particular section of the State.

Ferguson v. *Ross*, 126 N. Y., 459.

The Act of 1869 relates to or concerns the interests of the public at large. It grants a portion of the public domain to the Illinois Central Railroad Company, a corporation in which all the people of the State are directly interested, and it provides for a revenue to be collected and applied for State purposes. It authorizes that company to make improvements upon the granted lands, from which the State will derive a direct benefit, and which, so far as they furnish additional facilities for transportation by water or rail, will be of service, not solely or mainly to residents in Chicago, but to the general public.

A law providing for a public improvement at a particular place cannot be regarded as local in its character, if it be one of general public utility. Thus, as intimated by the New York Court of Appeals, an appropriation made for the improvement of navigation on the Hudson river, would not be regarded as an appropriation for a local purpose, although the money was to be expended in deepening the channel in a particular part of its course, since the benefit arising from the improvement would not be confined to the people living in the locality, but would be shared by the entire commerce of that great river.

The People v. *Allen*, 42 N. Y., 383.

For the same reason, the appropriations made by the General Government for the removal of obstructions to navigation at Hell Gate in the East river, for the construction of jetties at the mouth of the Mississippi, and for an outer harbor at Chicago, can with no propriety be regarded as appropriations for mere local purposes. A vast commerce, not confined even to any one State, shares in the benefit derived from each of these works. The public at large are interested in such improvements, not merely incidentally, or in some indefinite and remote sense, but directly and materially, as the re-

cipients of the main benefits and advantages arising therefrom.

Reference is made in the opinion to a provision in the constitution of 1870, (Art. 4, Sec. 22) which prohibits the General Assembly from passing "local or special laws" in certain enumerated cases, and this was thought to throw light upon the meaning of the word "local," as used in the constitution of 1848. The word, it is said, evidently has the same meaning in both instruments. But it will be found on examination of the clause referred to in the constitution of 1870, that a law making a grant of lands belonging to the State is not one of those enumerated. There is no provision in that instrument which prohibits the legislature from passing a special Act for that purpose; nor any expression which indicates that such an Act is to be regarded as local.

The Act incorporating the Illinois Central Railroad Company is clearly neither a private nor a local law. It is a special law; but prior to 1870 such laws were not prohibited. The corporation is not local to Chicago; its railroad extends through thirty or more counties. That section of the Act of 1869 by which the grant in question was made to this corporation, is no more local than the law which conferred upon it its corporate rights and franchises. Had the Act contained no other provisions, it would have been valid under any title, or without a title. There is no provision in the constitution of 1848 requiring the subject of such a law to be expressed in the title. The constitutional restriction does not extend to provisions which are neither private nor local; and therefore such provisions are valid although contained in a law with others having a local application, whether embraced within the title or not. As to such provisions the law is neither private nor local, but general and public. This was decided many years since by a court composed of eminent judges, and the decision

has been uniformly adhered to in subsequent cases involving the same question.

The People v. *McCann*, 16 N. Y., 58.
Williams v. *The People*, 24 N. Y., 405.
The People v. *Supervisors*, 43 N. Y., 10.
Richards v. *Richards*, 76 N. Y., 186.
Ferguson v. *Ross*, 126 N. Y., 459.

If, however, it be admitted that the Act of 1869 is local, the objection urged against it is untenable. The constitution required that only one subject should be embraced in a private or local law, and that it should be expressed in the title. The object of the restriction was to prevent surprise or fraud upon the legislature by covertly inserting provisions in bills of which the titles give no intimation, and to apprise the public, through such publication as is usually made of legislative proceedings, of the subjects under consideration, so that those who desire it may have an opportunity of being heard thereon by petition or otherwise. "There was no design to embarrass legislation by making laws unnecessarily restrictive in their "scope and operation, and thus multiplying their number."

Cooley's Const. Lim., 143, and cases there cited.

A similar restriction is found in many State constitutions, and attempts have been frequently made both in the Federal and State courts to invalidate statutes for alleged infringement of it. In these cases certain principles have been established, which furnish in general very clear guidance in passing upon such objections,—among them the following:

a. "This provision of the constitution must receive a fair "and reasonable construction; one which will repress the evil "designed to be guarded against, but which, at the same time, "will not render it oppressive or impracticable."

Belleville Railroad Co. v. *Gregory*, 15 Ill., 29.

Carter County v. *Sinton*, 120 U. S., 522.
Cooley's Const. Lim., 146.

b. "The legislature must determine for itself how broad "and comprehensive shall be the object of a statute, and how "much particularity shall be employed in defining it." "The "generality of the subject expressed in the title is no objection "to it, since it is purely a matter of legislative discretion "whether the subject expressed in the title shall be general or "specific."

The People v. *Nelson*, 133 Ill., 565.
O'Leary v. *County of Cook*, 28 Ill., 534, 538.
Cooley's Const. Lim., 144.

c. If the title adopted is sufficient to apprise the legislators of the general subject of the enactment, every provision therein fairly related to that general subject, or which forms a subordinate branch or part of it, is valid. The fact that many things of a diverse nature are authorized or required to be done, is unimportant, provided they are not foreign to the general subject expressed in the title. "Any expression in "the title which calls attention to the subject of the bill, al- "though in general terms, is sufficient."

Town of Abington v. *Cabeen*, 106 Ill., 200, 207.
The People v. *Blue Mountain Joe*, 129 Ill., 371, 377.
Blake v. *The People*, 109 Ill., 504.
Johnson v. *The People*, 83 Ill., 432.
The People v. *Hazelwood*, 116 Ill., 320.
Louisiana v. *Pilsbury*, 105 U. S., 278, 289.
Montclair v. *Ramsdell*, 107 U. S., 147.
Jonesboro City v. *Cairo and St. L. R. R. Co.*, 110 U. S., 192.
Mahomet v. *Quackenbush*, 117 U. S., 508.

d. "The conflict between the constitution and a statute "must be palpable, to justify the judiciary in disregarding it upon "the sole ground that it embraces more than one subject, or "that, if there be but one, it is not sufficiently expressed in the "title."

Montclair v. *Ramsdell*, 107 U. S., 147.
The People v. *Nelson*, 133 Ill., 575–6.
Cooley's Const. Lim., 183–186.

e. It is not necessary that all the legal effects of an Act should be stated in the title. Where the Act itself is clearly embraced in the title, all legal consequences necessarily flowing from it, will be regarded as embraced within the title also.

Mix v. *Illinois Cent. R. R. Co.*, 116 Ill., 502.
Timm v. *Harrison*, 109 Ill., 594.
Plummer v. *The People*, 74 Ill., 361.
The People v. *Wright*, 70 Ill., 389.

f. If there are parts of a private or local law not embraced in the title, these will be rejected; but this will not defeat the entire Act, if the other provisions are separable and can be enforced independently.

The People v. *Nelson*, 133 Ill., 566.
Donnersberger v. *Prendergast*, 128 Ill., 230.
Binz v. *Weber*, 81 Ill., 288.
Presser v. *Illinois*, 116 U. S., 252, 263.
Unity v. *Burrage*, 103 U. S., 458–9.
Penniman's Case, 103 U. S., 716–17.
Packet Co. v. *Keokuk*, 95 U. S., 80.

The Act of April 16, 1869, is entitled: "An Act in rela- "tion to a portion of the submerged lands and Lake Park "gronnds lying on and adjacent to the shore of Lake Michi- "gan, on the eastern frontage of the city of Chicago." No more appropriate words could have been selected to indicate

the subject of legislation. No one could be misled by the title, or doubt what the subject-matter was to which the bill related.

By *subject* is meant that which is brought under thought or examination; that which is taken up for consideration or action; that which is treated or handled in writing or discourse. This law had but one subject—the disposal of the lands referred to in the title. It is impossible to say that this was more than one subject; but it was general and comprehensive enough to embrace everything contained in the body of the Act. To this there is no constitutional objection. How broad the scope of a local statute shall be, provided it relates to but one subject, is a matter left to legislative discretion. A bill to incorporate a city, or a college, or a railroad company, often contains a great diversity of provisions on minor subjects. Each usually embraces many details, but if they all relate to one general subject it cannot be said that the bill is repugnant to either the letter or spirit of the constitutional provision in question.

A brief reference to a few Illinois decisions may be of service by way of illustration.

A law passed in 1867, entitled "An Act to authorize the town of Ottawa to erect two bridges across the Illinois and Michigan Canal," named certain persons as commissioners to erect two bridges across the canal in the city of Ottawa, and contained a provision that the bridges when constructed should be maintained and kept in repair by the *city*, and another provision that the cost of building the bridges should be defrayed by a tax to be levied on the *town*. It was held that the Act embraced but one subject, and that the subject was expressed in the title. "The adjuncts to that subject," it is said, "are not "required to be expressed or the *modus operandi*."

City of Ottawa v. *The People*, 48 Ill., 233.

A law passed in 1867, entitled "An act to prevent domestic "animals from running at large in the counties of Monroe, St. "Clair and other counties," contained provisions prohibiting domestic animals from running at large in the counties named in the title and several other counties mentioned in the body of the Act. Provision was made for submitting the law to the voters in each county, and to the voters in any precinct of either county, and if a majority of the voters in either of the counties or precincts should so decide, it was to be in force in such county or precinct. It was urged that as the title of the Act referred only to counties, and not to precincts, the subject was not expressed in the title; and further that, inasmuch as several counties were embraced in the law, some of which were not mentioned in the title, the Act contained more than one subject. The court held that the objection was not even plausible. The subject of the Act was the prevention of domestic animals running at large in certain localities. The territory of the several counties was embraced in the subject of the bill, as was each precinct within that territory, and it was decided that the law which had been adopted in one of those precincts was there valid and binding, although rejected by the voters of the county.

Erlinger v. *Boneau*, 51 Ill., 94.

By a law passed in 1867, entitled "An Act to authorize "the city of Belleville, and the town of Mascoutah to issue "bonds," authority was given to the city of Belleville to issue bonds to pay for subscriptions authorized to be made to the capital stock of any railroad, macadam or plank road leading to or from that city; and by a separate section it was provided that the Act should "also apply to, and be in force for the use "and benefit of the town of Mascoutah." By another section the town of Nashville, in another county, was also authorized to avail itself of the benefit of the Act. (1 Priv. Laws 1867, page

841.) Bonds having been issued by the town of Mascoutah pursuant to this authority, a procceding was instituted to contest the validity of the Act. It was urged that the bill contained more than one subject, but the objection was overruled. "According to numerous decisions of this court," says Mr. Justice WALKER, who wrote the opinion, "so far as the Act relating to the city of Belleville and the town of Mascoutah is concerned, there was but one subject-matter. The issue of the bonds by those municipalities to pay for stock authorized to be subscribed to any railroad, macadam or plank road, was the controlling purpose of the law, and the various provisions of the Act only prescribed the mode of carrying this purpose into effect. Even if the law is void as to Nashville, we are at a loss to comprehend in what manner that could affect the Act so far as it relates to Belleville and Mascoutah. The doctrine is well established, that although some provisions of an Act are repugnant to the constitution, the others are valid if they are capable of being carried into operation; and there can be no doubt that all relating to Nashville may be stricken out, and still enough remain to permit Belleville and Mascoutah to issue and deliver valid and binding bonds. These are the views entertained when the case of *Decker* v. *Hughes*, 68 Ill., 33, was before us on a petition for a rehearing, but, as they seemed to be so obvious, they were not expressed in an opinion."

Binz v. *Weber*, 81 Ill., 288.

In 1853, a law was passed entitled "An Act to amend an Act, incorporating the Ottawa Hydraulic Co. and the La Salle County Manufacturing Co., both incorporated under the general law, approved February 10, 1849," by which the corporate existence of both corporations was recognized and their powers enlarged. The Act was assailed on the ground that it was in conflict with that provision of the constitution of 1848, now under consideration; but the objection was not sus-

tained. The court say, "Both corporations were located "and doing business in Ottawa in 1853, when the Act "was passed. Both were incorporated under the general cor- "poration law of 1849, and were alike interested in the water "privileges afforded by the canal at that place. . . . It "can hardly be that this objection is founded upon the fact that "the legislature has, by a single Act, conferred certain pow- "ers and privileges upon two distinct corporate bodies. It "would be just as reasonable to say that the legislature, by "reason of the constitutional provision in question, could not "make a joint grant to two separate persons, and no one, we "presume, would contend for that for a moment. The pro- "vision of the constitution in question has often been before "this court, and we have no hesitancy in saying there is no "good ground for the claim that the Act of 1853 is unconsti- "tional on the grounds suggested."

The People v. *Ottawa Hydraulic Co.*, 115 Ill., 281.

Attention is also invited to:

In re Mayer, 50 N. Y., 504.
People v. *Wilsea*, 76 N. Y., 507.
Hoboken v. *Penn. Railroad Co.*, 124 U. S., 657.
Carter County v. *Sinton*, 120 U. S., 517.
Mahomet v. *Quackenbush*, 117 U. S., 508.
Otoe County v. *Baldwin*, 111 U. S., 1, 16.

The validity of the Act of 1869 was further questioned in the court below, on the ground that it did not pass the two houses under the same title.

The bill, when introduced in the House of Representatives, bore the following title: "An Act to enable the city of Chi- "cago to enlarge its harbor, and to grant and cede all the "rights, title and interest of the State in and to certain lands

" lying on and adjacent to the shore of Lake Michigan on the " eastern frontage of said city." (Rec., 552.) The bill was amended in the House, but retained its original title until it had passed that body. Then, by order of the House, the title was changed to that which it has since borne. (Rec., 560.) The bill was sent to the Senate bearing the amended title, which it afterwards retained. (Rec., 574, 576.)

It has been decided by this court in an Illinois case, that " there is no rule of parliamentary law, and there is no provision of the constitution of Illinois, which requires a bill to preserve the same title through all its stages in both Houses."

Walnut v. *Wade*, 103 U. S., 683, 692.

Although the title is made by the constitution of Illinois an essential part of the bill at the time of its passage, it is not material that the bill passed the two Houses under different titles, so long as either was sufficient to answer the constitutional requirement.

Plummer v. *The People*, 74 Ill., 361.
Johnson v. *The People*, 83 Ill., 432.

The title of the Act in question, at the time of its passage in the House fully answered that requirement. The subject was clearly expressed by the words, " An Act . . . to " grant and cede all the rights, title and interest of the State " in and to certain lands lying on and adjacent to the shore of " Lake Michigan, on the eastern frontage of the city of Chi- " cago." The other words, " to enable the city of Chicago to " enlarge its harbor, and," were, no doubt, superfluous; but they do not vitiate the Act, since the subject-matter is sufficiently indicated by the rest of the title.

Prescott v. *City of Chicago*, 60 Ill., 121.
Binz v. *Weber*, 81 Ill., 288.
Blake v. *The People*, 109 Ill., 504.

It is a further sufficient answer to this objection, that the bill passed the House a second time, after its veto by the Governor, with the same title it bore when it passed the Senate. (Rec., 573.)

XIV. The title asserted by the railroad company under the Act of April 16, 1869, is attacked on several other grounds which require some notice.

1. It has been strenuously insisted that the State has no title in the bed of the Lake which can be transferred by grant to private ownership.

This contention is in irreconcilable conflict with the claim made by the State in the amended information. It is there alleged, that the rights asserted by the railroad company "are a "great and irreparable injury to the State of Illinois as a pro- "prietor and owner of the bed of the lake, throwing doubts "and clouds upon its title thereto, and preventing *an advan-* "*tageous sale or other disposition thereof*" (Rec., 142); and a part of the relief prayed for is, "that the State of Illinois may "be declared to have the sole and exclusive right to develop "the harbor of Chicago by the construction of docks, wharves, "etc., and to *dispose of such rights at its pleasure.*" (Rec., 143.)

This subject has been adverted to in a preceding part of this brief (Point II.), where a number of pertinent and well-considered cases have been cited. What has been there said need not be repeated. It is sufficient here to remark that nothing is better settled in the law of this country, than that each State has the right to dispose of its property in the soil under navigable waters in any manner it may deem proper.

Weber v. *Harbor Commissioners*, 18 Wall., 57.
Hoboken v. *Penn. Railroad Co.*, 124 U. S., 657.

It is equally well settled, that the legislature of each State has complete control, in the absence of constitutional restrictions, over all the property of the State, and is invested with general authority to make laws at its discretion. To ascertain whether a particular Act is within the power of the legislature, we do not ask if special authority to pass it has been delegated, but we look to see whether the general authority vested in that department has been so limited by the organic law as to make the Act invalid.

The court will search in vain for any provision in the constitution of Illinois prohibiting the General Assembly from granting the title of the State to the soil under navigable waters. There is no such inhibition.

2. It has been further insisted that the grant of the submerged lands was a nullity, by reason of the incapacity of the railroad company to take and hold them.

By its original charter the company was, in express terms, invested with the power of "contracting and being contracted "with," and of "acquiring by purchase or otherwise, and of "holding and conveying real and personal estate, which may "be needful to carry into effect fully the purposes and objects "of this Act." (Rec., 612.) It was certainly competent for the company to take and hold, under this first grant of authority, any part of the lands in controversy which might be required for the management and development of its business. A railroad company has implied authority to build elevators and warehouses for the storage of property transported or to be transported on its road, and if it has a terminus on navigable waters, it has the right to construct wharves and slips to facilitate the transfer of freight from vessels to cars and *vice versa*. Land required for these purposes may be lawfully purchased by the corporation.

1 Morawetz on Priv. Corp., Sects. 368, 370.
Pierce on Railroads, 506.

That there was actual necessity for the immediate use of some of the land granted to the company by the Act of 1869, is conclusively established by the evidence, and must be conceded. *If it had purchased the whole tract from a private owner*, his deed would have passed the title. No one but the State could object that the company was holding property in excess of its legitimate necessities. The State alone could assert its policy in that regard.

National Bank v. *Matthews*, 98 U. S., 621, 628.
Alexander v. *Tolleston Club*, 110 Ill., 65.
Hough v. *Cook County Land Co.*, 73 Ill., 23.
1 Beach on Priv. Corp., Sec. 378.

And if the State by appropriate legislation had given its consent to the purchase, or afterwards confirmed it, the title would be secure against attack even from that quarter.

But the grant in this case came from the State. It emanated from the sovereign authority, which could create corporations or enlarge their powers. Coming from such a source, the grant itself conferred the capacity to take and hold the lands. "A legislative grant operates as a law as well "as a transfer of property, and has such force as the legis-"lature intended."

Schulenberg v. *Harriman*, 21 Wall., 62.

By necessary implication the Act of 1869 gave whatever power was necessary for the enjoyment of the property granted. It is presumed in the case of public grants, as well as in those between private parties, that the grantor intends to convey, and the grantee expects to receive, not only the land specifically described, but all other things, so far as it is in the power of the grantor to pass them, which are necessary for the enjoyment of the land granted.

Chicago, R. I. & P. Ry. Co. v. *Smith*, 111 Ill., 363.

Haps v. *Hewitt*, 97 Ill., 498.
McAuley v. *Columbus, C. & I. C. Ry. Co.*, 83 Ill., 348.
Langdon v. *The Mayor*, 93 N. Y., 144.
Bow v. *Allenstown*, 34 N. H., 351, 372.
2 Dillon's Munic. Corp, Sec. 560.

It is on this principle that a grant of land by a State to an alien and his heirs, is held necessarily to imply that he shall have capacity to transmit by inheritance to his alien offspring, and that they shall have equally a capacity to take, although by the general laws of the State aliens may be incapable of taking by purchase or inheritance.

Goodall v. *Jackson*, 20 Johnson, 707.
Commonwealth v. *Heirs of Andre*, 3 Pick., 224.

3. It is charged in the information that the Act of 1869, "if otherwise legal, was inoperative by reason of the peculiar-"ity in the terms of the grant, the legislature by said pretended "Act purporting to grant the fee to said railroad company, and "by the said pretended Act expressly withholding from said "railroad company the power to grant, sell or convey the "same." (Rec., 139.)

This objection is captious. The granting words are: "All "the right, title and interest of the State of Illinois in and to "the submerged lands constituting the bed of Lake Michigan, "and lying," etc., "are hereby granted, in fee to the said Illinois "Central Railroad Company, its successors and assigns: *Pro-"vided, however*, that the fee to said lands shall be held by "said company in perpetuity, and that the said company shall "not have power to grant, sell or convey the fee to the same, "and that all gross receipts from use, profits, leases or other-"wise of said lands or the improvements thereon, or that may "hereafter be made thereon, shall form a part of the gross

"proceeds, receipts and income of the said Illinois Central "Railroad Company, upon which said company shall forever "pay into the State treasury, semi-annually, the per centum "provided for in its charter, in accordance with the require- "ments of said charter." No language could more clearly express the intention of the legislature. The intention plainly was to ingraft a trust upon the fee, for the benefit of the State in perpetuity. The trust having been created by the law-making power, no legal objection can be made to it.

4. It has also been insisted that the Act of 1869 was ineffectual to pass the title to the submerged lands, because a grant of land belonging to the State could not be made by a mere Act of the legislature.

The constitution of 1848 provided (Art. 4, Sec. 25) that "all grants and commissions shall be sealed with the great seal of State, signed by the Governor or person administering the government, and countersigned by the Secretary of State." It is contended that, by reason of this provision, a formal deed or patent signed by the Governor and attested by the great seal was necessary in all cases to the validity of a grant of land by the State.

This position is not tenable. The constitutional provision in question was not intended as a limitation upon the power of the legislature. It is found in the fourth article of the constitution, which relates to the executive department, and its only object was to prescribe the mode in which grants and commissions, which that department had authority to issue, should be authenticated.

The principle is thoroughly settled by numerous decisions of this court, as well as of the Supreme Court of Illinois, that a perfect grant of land may be made by law, without the issuing of a patent or any other documentary evidence of title.

Strother v. *Lucas*, 12 Pet., 454.

Grignon's Lessee v. *Astor*, 2 How., 319.
Ryan v. *Carter*, 93 U. S., 78.
Morrow v. *Whitney*, 95 U. S., 551.
Whitney v. *Morrow*, 112 U. S., 693.
Ballance v. *Tesson*, 12 Ill., 326.
Hall v. *Jarvis*, 65 Ill., 303.
Keller v. *Brickey*, 78 Ill., 133.
County of Piatt v. *Gumley*, 81 Ill., 350.

These authorities show conclusively that an Act of the legislature making a direct grant of land is higher evidence of title than a patent, because it is the direct grant of the land by the government itself, whereas a patent is only the act of its ministerial officers.

By an Act of the legislature of Illinois approved June 22, 1852 (Laws 1852, p. 178), all the swamp and overflowed lands which had been granted to the State by the Act of Congress approved September 28, 1850, were granted to the counties in which they were situated. Authority was conferred upon the county court of each county to advertise and sell the lands at public sale, and to execute deeds to the purchasers. No provision was made for the issuing of any patent by the State. None of these lands—probably exceeding in the aggregate two million acres—all or nearly all of which are now in the hands of private purchasers, are held under any patent. In *Keller* v. *Brickey*, above cited, it was held that the State had by competent authority passed the title to these lands to the counties, and that a deed executed by the county clerk *vested in the purchaser the absolute title in fee simple to the land described in it.* In *County of Piatt* v. *Gumley*, *supra*, it was held that the county could maintain *an action of ejectment* to recover a tract of land, which had been certified to the county as swamp land by the State auditor pursuant to the provisions of the Statute.

But the point here raised has been passed upon by this court in a case almost precisely analogous. In the year 1782, the legislature of North Carolina passed an Act granting 25,000 acres of land to Major General Nathaniel Greene, his heirs and assigns. The constitution of North Carolina at that time contained this provision: "That there shall be a seal of "this State, which shall be kept by the Governor, and used by "him as occasion may require; and shall be called the great "seal of the State of North Carolina, and be affixed to all "grants and commissions." In a suit involving the title to some of those lands, it was objected that the legislative Act could not have effect as a grant, since it wanted the formality required by the constitution. The objection was not sustained. In the opinion of the court, delivered by Chief Justice MARSHALL, it is said: "This provision of the constitution is so "obviously intended for the completion and authentication of "an instrument, attesting a title previously created by law, "which instrument is so obviously the mere evidence of prior "legal appropriation, and not the act of original appropriation "itself, that the court would certainly have thought it unnec- "essary to advert to it, had not the argument been urged re- "peatedly, and with much earnestness, by counsel of the high- "est respectability."

Rutherford v. *Greene's Heirs*, 2 Wheat., 196.

This ruling is referred to with approval by Chief Justice Taney, in delivering the opinion of the court in

Fremont v. *United States*, 17 How., 559.

But, if it were conceded that these decisions are erroneous, and that the formality of a deed or patent was necessary to the complete transfer of the legal title, it would not follow that the Act of 1869 was inoperative. If not effectual as a grant, it would still be binding on the State as a contract. At most, it could only be said that the legal title had not passed. It

could not be denied that the equitable title had vested in the company. In that aspect of the case, the State is in the attitude of a party asking the aid of a court of equity in doing what is contrary to the first principles of equity.

5. There is another point put prominently forward in the information, to the effect that the land in Fractional Section Fifteen Addition to Chicago, lying east of Michigan avenue and between Park Row and the center line of Madison street extended, was granted by the State to the Canal Trustees in 1845, and that the title remained in them until they reconveyed the property to the State in 1871. It is contended that during the intermediate period the State had no title which it could convey to the railroad company; and further, that this is a part of the land granted to the State by Congress in 1827 to aid in the construction of the canal, and that it could be sold by the State only for the purpose of procuring funds to complete or maintain that work.

On this ground it is claimed that the railroad company acquired no right under its charter, or the city ordinance of 1852, or the Act of April 16, 1869, to enter upon any part of that land and appropriate it to railroad or other uses.

All the material facts on which this contention is based are set forth on pages 10 to 15 of the opening statement.

It is true that fractional section fifteen was one of the tracts of public land granted to the State by Congress in 1827 to aid in opening the canal. But express provision was made in the Act, that the State, under the authority of its legislature, should "have power to sell and convey the whole or any part of the said land, and to give a title in fee simple therefor" to the purchasers. There was also a further provision that, if the canal should not be commenced and completed within the time specified, "the State shall be bound to pay to the United

States the amount of any lands previously sold, and that the title to purchasers under the State shall be valid." (Rec., 580.)

It is clear that no trust was attached to the lands; nor was the discretion of the legislature in disposing of them in any way controlled by the Act. Certainly the State could not rescind its grant on the ground that it had failed to perform its duty.

Emigrant Company v. *County of Adams*, 100 U. S., 61.

Mills County v. *Railroad Companies*, 107 U. S., 557.

Hagar v. *Reclamation District*, 111 U. S., 701.

But there has been no default on the part of the State. The canal was completed in 1848 (Rec., 507), and continuously since then has been open to the use of the public.

In 1836 the canal commissioners, pursuant to the provisions of an Act of the legislature approved January 9, 1836, laid off fractional section fifteen into town lots, and caused a map of the division to be made and recorded. (See *ante*, p. 11.) It is alleged in the information that only a *part* of the tract was subdivided—that the subdivision "did not extend east of Michi-"gan avenue, as the same is now occupied and used, except a "narrow strip on the south end thereof." (Rec., 127.) But the law under which the commissioners were acting, directed that the whole fractional section should be "laid off and subdi-"vided into town lots, streets and alleys" (Rec., 592); and the map of the subdivision, which was put in evidence, shows upon its face that the entire tract was subdivided in conformity to that requirement. (Rec., *1191*.)

In front of the easterly row of lots, a wide street, occupying the whole space between them and the lake, is laid out on the map styled "Michigan avenue." One of the witnesses for the complainant (Mr. Scammon) testifies that it was the habit-

ual practice in laying out towns on the shores of rivers in the southern part of the State, to leave a wide margin along the river for a levee, and that Gen. Thornton, who was "the controlling spirit of the board of commissioners," caused that plan to be adopted by the board in making this subdivision. Michigan avenue (he says) was laid out on the plat as a wide levee extending to the lake; and the lots "were prized a great deal higher "and brought a good deal more money, because they fronted on "this wide street that extended to the lake." (Rec., 443.) The map itself furnishes conclusive evidence of the intention of the commissioners to dedicate the entire strip to public use.

Village of Brooklyn v. *Smith*, 104 Ill., 429.

In laying out the subdivision, the commissioners appear to have complied generally with the provisions of the law then in force relating to town plats. (*Ante*, pp. 11, 12.) The only deviation worthy of notice is, that the surveyor's certificate was made by an engineer in the employment of the canal commissioners, instead of the county surveyor; but the Supreme Court of the State seem to have decided, that in the case of plats made by the canal commissioners such a departure from the strict letter of the law is not material.

City of Chicago v. *Rumsey*, 87 Ill., 348.

Zinc Company v. *City of La Salle*, 117 Ill., 411.

Although, as held in a recent decision, when land is laid out by other proprietors than the State, if the plat is not certified by the county surveyor, the legal title to the streets does not vest in the town or city.

Village of Auburn v. *Goodwin*, 128 Ill., 57.

If the plat in question is to be regarded as statutory, the legal title to the ground designated thereon as Michigan avenue became vested in the town of Chicago, upon the recording

of the plat. The plat in such case has all the force of an express grant. It operates by way of estoppel, and concludes the former owner and all claiming under him from asserting title. Upon the vacation of the streets, the title reverts to the former owner; but until the estate is thus defeated, it is held that the fee is as completely out of him as if he had made an absolute conveyance. "While the fee continues in the cor-"poration, he has no greater interest in the streets and alleys "than any other person—the right of passage over them. "Having neither the legal title nor the exclusive right of pos-"session, he cannot bring trespass for any injury to the soil or "freehold. He has no title to be assailed, no possession to be "invaded."

Zinc Company v. *City of La Salle*, 117 Ill., 414, 415.
Gebhardt v. *Reeves*, 75 Ill., 301.
Hunter v. *Middleton*, 13 Ill., 50.
Canal Trustees v. *Havens*, 11 Ill., 554.

If it was not a statutory plat, although the legal title to the streets did not vest in the town, the public acquired the same rights it would have had in them if the fee had passed to the municipality.

Maywood Company v. *Village of Maywood*, 118 Ill., 61.
Gould v. *Howe*, 131 Ill., 490.

The lots, it is proved, were sold by the commissioners as laid out upon the plat and with reference to the plat. The purchasers of the lots, therefore, acquired a special interest in the streets on which their lots abutted. It is manifest that neither the canal commissioners nor the State could after the sale of the lots, make any disposition of the streets inconsistent with the use to which they had been dedicated.

In either case, it is clear that after the sale of the lots there

was no canal land left in fractional section fifteen undisposed of.

The grant made by the State to the canal trustees in 1843, to secure the payment of the loan then about to be negotiated (*ante*, p. 13), included the canal and "all the remaining lands and lots belonging to the canal fund." The supplemental Act of March 1, 1845 (*ante*, p. 14), provided for the execution of a deed to the canal trustees as security for the loan, which was to "include the lands and lots remaining unsold donated by the United States to the State of Illinois, to aid in the completion of the said canal."

In the deed executed by the Governor June 26, 1845 (*ante*, p. 14), these Acts are recited at length, and it is declared that the conveyance is made "to and for the uses and purposes in "said Acts expressed and intended." No lands were specifically described in either of the two Acts or in the Governor's deed; and as the State had then no property left in fractional section fifteen available for canal purposes, it is apparent that no land in that section passed under the general description contained in the Acts and deed.

It is not pretended that the canal trustees ever asserted title to the public ground in that section. The theory that they had a title is a late invention, first announced in 1884 (Rec., 43)—a year after the institution of the present suit, and more than forty years subsequent to the act of 1843.

But the grant to the canal trustees, whatever it included, was made in trust, to secure a loan. It was an express condition of the trust, that when the debt should be paid the canal and the remaining canal property and assets should revert to the State. The legal title to the property covered by the trust passed to the board of trustees, but an equitable estate remained in the State. It was competent for the legislature to transfer this estate at its pleasure. Any mortgagor may

sell and convey his equity of redemption in a tract of land; and no reason is or can be suggested why this right may not be exercised by a sovereign State, which, in addition to the ordinary rights of a land owner, has also the power to enact laws. The charter of 1851, and the Act of 1869, by which cessions of land were made to the railroad company, were enacted by the legislature and have the force of laws. As the right of the legislature to make the laws is unquestionable, it is impossible to impeach the validity of the grants. If any of the property ceded was covered by the trust created to secure the payment of the canal debt, the company took the encumbered portion subject to the trust, just as one who buys mortgaged property takes subject to the mortgage; but when the debt was paid and the trust terminated, the title of the company became absolute and indefeasible. It is proved that the trust was fully executed and the canal debt extinguished in 1871. (See *ante*, p. 15.)

The fact is, moreover, that no ground is occupied by the railroad company which in 1852 formed part of fractional section fifteen. The railroad was located and built in *front* of the public ground, at some distance from the shore, in the open waters of the lake. Some portion of the ground occupied —how much is uncertain—appears to have been dry land in 1836; but in 1852 all of it was covered by water, varying in depth in different places from two and a half to nine feet. (See *ante*, p. 9.) It had ceased to be part of fractional section fifteen, and had become part of the bed of the lake.

6. Lastly, it has been contended that the grant made to the railroad company by the Act of 1869 was annulled by Section 2, Article XI, of the constitution of 1870, which went into effect August 8, 1870.

Article XI of the constitution of 1870 is entitled "Corporations". It contains fifteen sections, all of which relate to the subject of corporations. The first two sections are as follows:

"Sec. 1. No corporation shall be created by special laws, "or its character extended, changed or amended, except those "for charitable, educational, penal or reformatory purposes, "which are to be and remain under the patronage and control "of the State, but the general assembly shall provide, by "general laws, for the organization of all corporations here- "after to be created.

"Sec. 2. All existing charters or grants of special or exclu- "sive privileges, under which organization shall not have taken "place, or which shall not have been in operation within ten "days from the time this constitution takes effect, shall there- "after have no validity or effect whatever."

The remaining sections prescribe certain general rules for the regulation and government of incorporated companies; and no provision is found in the article on any subject not directly and closely connected with the exercise of corporate powers.

The second section forms no exception. The object of that provision is well understood by the profession in Illinois, and is clearly enough disclosed by its own words. In anticipation of a revision of the constitution of 1848, and of the restraints which would probably be placed upon the legislative power of granting special charters to private corporations, a great many private Acts of incorporation had been procured between 1865 and 1870, under which no organization had been effected, and which were then held by the corporators for sale or transfer to other parties, as opportunity might occur. The private laws of 1865 filled two large octavo volumes; those enacted in 1867, three volumes; and those enacted in 1869, four volumes. The object of this constitutional provision was to va-

cate all charters under which no rights should become vested within the time designated; and the enactment applies *only* to "charters or grants of special or exclusive privileges."

The Act of 1869 was neither a charter nor a grant of special or exclusive privileges. It contained a grant of *land* to a corporation *already* organized, and took effect immediately upon its passage. It was not the object of this clause of the constitution to revoke any grant of public property which the State had made. Such grants could not be revoked by the State, either by legislative Act or by amending the constitution. The grant made by the Act of 1869 was formally accepted by the railroad company before the constitution of 1870 went into effect, and it was assented to and informally accepted immediately after the passage of the Act. Notice of the acceptance was on file in the office of the Secretary of State, and a large amount of money had been already expended by the company in improvements upon the property.

XV. The pretensions of the city of Chicago to a part of the land in controversy remain to be considered.

1. The claim is advanced by the city in its answer to the amended information and in the cross-bill, that it had acquired a vested interest in the submerged land lying east of the breakwater between Randolph street and Park Row, before April 16, 1869, of which it could not be deprived by the legislature without compensation. For this reason, it is insisted that the grant made to the railroad company by the Act of 1869 was invalid, and the repeal of the Act in 1873 was, therefore, free from constitutional objection.

There is often no better way of refuting an extravagant proposition than by stating it clearly. The contention is, that by the making and recording of the plats of Fractional Section Fifteen Addition (in 1836) and Fort Dearborn Addition (in

1839), the legal title to the public ground lying east of Michigan avenue, between Randolph street and Park Row, became vested in the city, with all the littoral rights appertaining to the land as it was then situated. These rights, it is asserted, were rights of private property vested in the city, which are protected from disturbance by the legislature, both by the constitution of Illinois and the constitution of the United States. (Rec., 106, 107, 113, 114.)

The moment we examine this theory closely it is seen to be fallacious. We are not obliged to enter upon the question, whether it was the legal effect of the plats, or either of them, to vest the fee of the streets in the city. If it be conceded that they had such effect, it is perfectly clear that the city took and held the title wholly for public purposes. It acquired no private, beneficial interest in the streets. It could not alien or otherwise dispose of them for its own private benefit. At most, it held a naked legal title in trust for the benefit of the public —not exclusively the citizens of Chicago, but all the inhabitants of the State.

City of Alton v. *Illinois Trans. Co.*, 12 Ill., 38, 60.
Stack v. *City of St. Louis*, 85 Ill., 377.
Kreigh v. *City of Chicago*, 86 Ill., 407.
Lee v. *Town of Mound Station*, 118 Ill., 305.

The title was held by the city in its political capacity only, as a mere agency of the State, for the benefit of the general public; and the trust being *publici juris*, it was under the supreme control of the legislature.

City of Chicago v. *Rumsey*, 87 Ill., 348, 355.
The People v. *Walsh*, 96 Ill., 232.
Harris v. *Board of Supervisors*, 105 Ill., 445.
Lyman v. *Gedney*, 114 Ill., 388.
East Hartford v. *Hartford Bridge Co.*, 10 How., 511.

Meriwether v. *Garrett*, 102 U. S., 472.
Hoboken v. *Penn. Railroad Co.*, 124 U. S., 657, 693.
The People v. *Kerr*, 27 N. Y., 188.
City of Clinton v. *Cedar Rapids and Mo. R. R. Co.*, 24 Iowa, 455.
2 Dillon's Munic. Corp., Sects. 656-7.

In the *City of Chicago* v. *Rumsey*, *supra*, a question arose as to the right of the legislature to authorize the occupation of a portion of one of the streets of Chicago, which had been laid out by the canal commissioners on a recorded plat, for an approach to a tunnel under the river. In the argument, the point was made that the plat was not properly acknowledged, and, therefore, that the fee in the street was not vested in the city. Referring to that question, the court say:

"We do not regard it of any practical importance whether "it is more technically accurate to say the fee of this street is "in the State, or in the city. If it shall be said to be in the "corporation, there can be no pretense for saying that it is in "it otherwise than as an agency—a mere creature of the "State—existing only by authority of the legislature, and at "all times under its paramount supervision and control; and "if it shall be said to be in the State, it can only be said to be "there for the purpose of holding it for a street of the city; "and in either case, the sole purpose and end to be attained is "precisely the same—the holding it for the uses of a street of "the city for the benefit of the public—not the citizens of the "city alone, but the entire public of which the legislature is "the representative. There could, therefore, be no necessity "for any formal act of conveyance or dedication of the fee; it "was already as completely under the paramount authority "and control of the legislature as it could possibly be for the "purposes of a street, and no conveyance or formal act of ded-

"ication by the State to the municipality could have invested "it with a more exclusive interest in or control over the street, "than was done by the Act of the legislature directing it to be "laid out as such. Cities, towns, etc., possess and can exer- "cise only such authority and control in regard to their streets "as may be delegated by the legislature. They have no in- "herent power or authority in this respect, and can act only "in subordination to the paramount authority of the legisla- "ture."

In *East Hartford* v. *Hartford Bridge Co.*, *supra*, it was held to be competent for the legislature to withdraw from a town a ferry franchise which had been previously granted to it. The decision is put upon the ground that legislative acts conferring such privileges upon towns must be regarded rather as public laws than as contracts. They relate to public interests; and the grantees, being mere organizations for public purposes, are liable to have their public powers, rights and duties modified or abolished at any moment by the legislature. "They are in- "corporated," say the court, "for public, and not private, "objects. They are allowed to hold privileges or property "only for public purposes. The members are not shareholders, "nor joint partners in any corporate estate, which they can "sell or devise to others, or which can be attached or levied "on for their debts. Hence, generally, the doings between "them and the legislature are in the nature of legislation rather "than compact, and subject to all the legislative conditions "just named, and therefore to be considered as not violated by "subsequent legislative changes."

In *Hoboken* v. *Penn. Railroad Co.*, *supra*, it was held that the State of New Jersey, being the absolute owner of the land under tide water, had the right to make a grant of such land adjacent to the shore, discharged from any easement the city may have had in front of streets which extended to the water.

"The public right represented by the plaintiff (the city) is," it is said, "subordinate to the State and subject to its control. "The State may release the obligation to the public, may dis- "charge the land of the burden of the easement, and extin- "guish the public right to its enjoyment. Whatever it may "do in that behalf conclusively binds the local authorities, "when, as in the present cases, the rights of action are based "exclusively on the public right."

In *The People* v. *Kerr*, *supra*, it is held, that although an indefeasible title in fee to the streets in the city of New York is vested in the municipality, yet "this is a trust for the bene- "fit of the public, not of the adjacent proprietors alone, nor of "the inhabitants or citizens of New York alone, but of the "whole people. The whole people have the same rights in "the highway uses of such a public street as the inhabitants of "the city or the owners of adjacent land. The title thus vested "in the city of New York is as directly under the power and "control of the legislature, for any public purposes, as any "property held directly by the State, or by any public body "or officer, and its application cannot be challenged by a cor- "poration, which, in respect to such property, at least, is a "mere agent of the sovereign power of the people."

In *City of Clinton* v. *Cedar Rapids and Mo. R. R. Co.*, *supra*, the Supreme Court of Iowa, speaking through Chief Justice DILLON, say: "The true view is this: Municipal corporations "owe their origin to, and derive their powers and rights "wholly from, the legislature. It breathes into them the "breath of life, without which they cannot exist. As it "creates, so it may destroy. If it may destroy, it may abridge "and control. Unless there is some constitutional limit on the "right, the legislature might by a single Act, if we can sup- "pose it capable of so great a folly and so great a wrong, "sweep from existence all of the municipal corporations of the "State, and the *corporation* could not prevent it. We know

"of no limitation upon this right so far as the corporations "themselves are concerned. They are, so to phrase it, the "mere tenants at will of the legislature. . . . But while "the corporation exists, and has been allowed to acquire *pri-* "*vate* property, such property is doubtless protected by the "constitutional provision the same as the private property of "the citizen. The distinction is just here. A city by its con- "stituent Act may be authorized to acquire property for a "market-house, a public hall or the like. Of this property the "city cannot be deprived by legislative Act, except it be taken "for public use, and if so taken, the city is entitled to compen- "sation. *But its property in the public streets is not of this na-* "*ture.* The city cannot alien it, nor use it for any other than "legitimate purposes. Over the use of property acquired by "the exercise of the right of eminent domain, or dedicated "under the statutes to public use, when the soil, the fee, "passes from the dedicator, the legislature, so far as regards "the rights of public corporations, possesses an unlimited con- "trol."

The theory maintained by the city is diametrically opposed to the principles established in the foregoing cases. It rests upon the unfounded assumption that the streets and public grounds in the city are held by the same tenure as private property owned by individuals. This clearly is not the law. The city had no vested private interest in the public ground on the lake shore, and could, therefore, have no private interest in the littoral rights, which are simply incidents of the principal estate. It held the title for public purposes only, and as a trustee for all the people of the State, of whom the legislature is the sole representative.

It is not pretended that the city has ever constructed a wharf east of the breakwater, or made any expenditures for improvements in that part of the lake. No title to the soil under water was ever granted to the city, nor has it ever had possession

of any part of the lands in controversy. It is, therefore, evident that the act of 1869 deprived the city of no property in the bed of the lake, nor did it impair any vested rights of the city or the obligation of any contract.

Reference is made in the answer and cross-bill filed by the city to several Acts of the legislature passed prior to 1869 (Rec., 106–7, 113–14), which, it is contended, furnish some support to the claim now under examination. By these acts certain general powers were conferred upon the common council of Chicago, and, among them, the following:

By the Act of March 4, 1837—by which the city was first incorporated,—

"To prevent all obstructions in the waters which are public "highways in said city."

"To lay out . . . streets . . . in said city, and "make wharves and slips at the end of the streets, on prop- "erty belonging to the city." (Rec., 537.)

By the Act of February 16, 1847—

"To lay out . . . streets . . . in said city, and "make wharves and slips at the end of streets."

"To build and construct a breakwater or barrier along the "shore of Lake Michigan for the protection of the said city "against the encroachments of the water."

"To pass all such ordinances as they may think proper to "preserve the harbor; . . . to prevent and remove all "obstructions therein, and to punish the authors thereof. ". . . The word 'harbor,' as used in this section, shall "be taken and deemed to include so much of Lake Michigan "as lies within the distance of one mile from the shore thereof, "into the lake, and the Chicago river and its branches, includ- "ing the piers." (Rec. 539–40).

By the act of February 14, 1851—

"To lease the wharfing privileges of the river, at the end "of streets."

"To preserve the harbor; . . . to prevent and re- "move all obstructions therein, and to punish the authors "thereof."

"To levy and collect taxes . . . for the erection of a "barrier to protect the city from the lake."

"To lay out public squares or grounds, streets, alleys, "lanes and highways, and to make wharves and slips at the "ends of streets." (Rec. 540–542).

By the act of February 13, 1863, the last provisions were re-enacted, with the exception of the clause authorizing taxes to be levied for the erection of a barrier to protect the city from the lake. (Rec. 545–6).

These were all the powers relating to the construction of wharves and slips, which were granted to the city prior to the passage of the Act of April 16, 1869. The contention is, that they authorized the city to construct wharves and slips in the waters of the lake, in front of the public ground between Randolph street and Park Row, and that the power was irrevocable.

The suggestion is utterly preposterous. The authority conferred was, to "make wharves and slips at the ends of streets"; and as there were, in fact, no streets ending at the lake, between the mouth of the river and Sixteenth street, prior to the extension of Randolph street in 1880, it is plain that the city could not without an usurpation of power construct a wharf anywhere on the premises in controversy. The practical construction put upon these provisions of the old charters always was, that they related only to wharves and wharfing privileges

at the ends of the streets terminating at the river. There wharves were built by the city, but nowhere else. It was not until 1854 that any part of the lake was even included within the corporate limits of the city (Rec. 543), although police jurisdiction was exercised over the adjacent waters within one mile of the shore.

The ground which was appropriated by the railroad company in 1852 in front of the shore, was then outside of the boundaries of the city. By that occupation a strip of land two hundred feet in width was interposed between the public ground and the lake. This was done with the consent of the common council and pursuant to the terms of a formal contract between the city and the company executed under their corporate seals. The company was entitled to the exclusive possession of that strip, and, as we insist, was also the owner in fee. The city reserved no right to construct wharves beyond it. It did not have even the right of access to the water east of the breakwater. It had no street or other ground upon the shore in contact with the navigable water. This was the situation in 1854, when the city limits were extended, and it remained unchanged in 1869.

The rule of strict construction is applied by the courts to charters of public as well as private corporations. Any reasonable doubt as to the extent of the authority conferred, especially if it relates to a matter extra municipal in its nature, or affects the right of the State to the control and disposition of its own property, will be determined against the corporation. As has been said by this court, "it is a well settled rule "of construction of grants by the legislature to corporations, "whether *public* or private, that only such powers and rights "can be exercised under them as are clearly comprehended "within the words of the Act or derived therefrom by neces- "sary implication, regard being had to the objects of the

" grant. Any ambiguity or doubt arising out of the terms " used by the legislature must be resolved in favor of the " public."

Minturn v. *Larue*, 23 How., 436.

The same principle has been repeatedly declared by the courts, in a variety of cases.

See 1 Dillon's Munic. Corp., Sects. 89–91, and cases there cited.

To give to the terms of the old charters the effect contended for by the city, this rule must be completely reversed. Another rule of law must also be violated. The right given to construct wharves at the ends of streets, was nothing more than a license, revocable, in respect to any street, at any time before it had been acted upon. Like all other municipal powers of a public character, it was subject to legislative control and could be modified, restrained or entirely withdrawn as the public exigencies might require.

United States v. *Railroad Company*, 17 Wall.. 322, 328–9.

Mount Pleasant v. *Beckwith*, 100 U. S., 514, 525.

Railroad Company v. *Ellerman*, 105 U. S., 166.

Williamson v. *New Jersey*, 130 U. S., 189.

Essex Public Road Board v. *Skinkle*, 140 U. S., 334.

New Orleans v. *N. O. Water Works Co.*, 142 U. S., 79.

2 Dillon's Munic. Corp., Secs., 68, 103, 110 n.

2. These objections of the city to the Act of 1869, were not sustained in the court below. But effect having been given to the repealing Act, it was thereupon decided that the city as *riparian owner*, and by virtue of authority conferred by its charter, has the power to erect and maintain public landing

places, wharves, docks and levees, east of the railroad, between the north line of Randolph street and the north line of block 23, subject to the authority of the State by legislation to establish an exterior dock line, and to such supervision and control as the United States may lawfully exercise in and over the harbor. (Rec. 222.)

If the grant made to the railroad company in 1869, was valid, and it was incompetent for the State to recall it, this ruling must obviously be reversed; and the same result will follow, if it shall be held that the city was not in fact the riparian owner. The first two questions have been already discussed. The last remains to be considered.

Riparian rights are rights incident to land contiguous to the water. According to the uniform tenor of all the authorities, the party claiming such rights must show that he owns or has the exclusive right to occupy and use the shore. "They do not attach to any lands, however near, which do not extend to the water."

Potomac Steamboat Co v. *Upper Pot. Co.*, 109 U. S., 672, 682–3.
Saulet v. *Sheppard*, 4 Wall., 502.
Bates v. *Illinois Central R. R. Co.*, 1 Black, 204.
Jones v. *Johnson*, 18 How., 150.
Bristol v. *County of Carroll*, 95 Ill., 84.
Gould on Waters, Sec. 148.

Does the city own any land in contact with the lake? On this question, the learned judges below differed in opinion. One thing is clear: The land next to the lake is occupied by the railroad company, and it has been decided in this case that the company is entitled to the exclusive possession and control of it in perpetuity. It is held, in the prevailing opinion, that

the company has only an easement, and that the fee is in the city.

If this ruling were correct, the result reached in the Circuit Court would not necessarily follow. Strong support is furnished by the authorities for the proposition, that a railroad company which acquires a perpetual right to the exclusive use and possession of land abutting upon navigable waters, is also entitled to enjoy the riparian rights incident to the land (if there has been no reservation of them by the former proprietor), although it does not own the fee.

Hanford v. *St. Paul and D. R. Co.*, 43 Minn., 104.
Godfrey v. *Alton*, 12 Ill., 30.
Cook v. *Burlington*, 30 Iowa, 94.
New Orleans v. *United States*, 10 Pet., 662.
Barney v. *Keokuk*, 94 U. S., 324.
Potomac Steamboat Co. v. *Upper Pot. S. Co.*, 109 U. S., 672.

So if land bordering upon a lake or a navigable stream is leased, the lessee will hold the accretions precisely as he does the land to which they have become attached. If it is mortgaged, or under any other lien, all subsequent accretions will come under the same burdens as those to which the land was subject before the accretions were formed. And so, the widow of a riparian owner is entitled to dower in the accretions to the land of which her husband was seized during coverture, whether they accrued whilst he owned the land or after he parted with the title. In this, as in other like cases, the incidents necessarily follow and are subject to the nature and condition of the principal estate.

Cobb v. *Lavalle*, 89 Ill., 331.
Gale v. *Kinzie*, 80 Ill., 132.
Lombard v. *Kinzie*, 73 Ill., 446.

But how, it may be pertinently asked, did the city acquire a title to the ground occupied by the railroad company? It is certainly no part of the land dedicated to the public on the plats of Fractional Section Fifteen Addition and Fort Dearborn Addition to Chicago; nor is it held by the city on the same trust. Before the railroad was built, the land belonged to the State. It was occupied by the company with the consent of the city, but the right to take it was derived from the State, under the grant to the company in its charter.

It is said in the opinion last referred to, that the city had the right as riparian owner, before the passage of the ordinance of 1852, to fill in the lake and erect walls to the extent necessary to protect its property against the violence of the water, if it did not thereby interfere with the public rights of navigation; and that power was expressly given it to erect a breakwater for that purpose. If it had itself erected a breakwater on the precise line adopted by the railroad company under the ordinance of 1852, and filled in the space between the breakwater and the shore, it would have become, says the learned judge, the owner of all the ground thus reclaimed and occupied. But it must be admitted, that whatever may have been potentially the rights of the city before the railroad was located, it could not, after possession had been lawfully acquired by the railroad company, rightfully invade that possession for the purpose suggested or any other. The city, as matter of fact, erected no breakwater and acquired no title to the land occupied by the railroad company before the passage of the ordinance of 1852; and, unless, what was done by the company pursuant to the terms of the ordinance invested the city with title, it acquired none afterwards.

It is intimated in the opinion that the city, instead of building a breakwater itself, *employed the railroad company to erect one*; and when the work was completed, and the area set

apart for the railroad had been filled in by the company, and the space between the railroad and the shore had been reclaimed by the city, the latter became the owner in fee of all such reclaimed ground, including that occupied by the railroad tracks and the breakwater. (Rec., 202.)

If the work done by the company was really performed by it as an agent of the city, there would be some plausibility in this theory. But if the work was done by the company on its own account, in the prosecution of the enterprise contemplated in its charter, namely, the construction of a railroad, no such result could possibly follow.

The important question then is, what relation did the railroad company sustain to the city under the ordinance and contract of 1852? The object of that ordinance was to provide for the location of the railroad within the city. The route to be adopted for the road depended upon the action of the common council. To obtain the requisite action was the only object the company had in view in making application to that body; and nothing is contained in the ordinance which does not relate either directly or incidentally to that subject. The consent granted by the ordinance was given upon certain conditions, one of which was that the company should erect and maintain a breakwater. But in the construction of that work the city was in no sense a principal and the company an agent. The city incurred no responsibility to third persons on contracts made by the company, or for negligence or other wrongful acts of the company or its servants, in prosecuting the work; and the work when completed belonged to the company, and not to the city. The real facts are, that the company obtained the consent of the city to lay out and construct its railroad on a certain prescribed route, and that it contracted certain obligations. But the reciprocal rights and duties of the parties do not depend upon the principles of the law

of agency. It is a mistake to suppose that any relation of agency was created between them.

If these views are correct, the title to the land occupied by the railroad company between Park Row and Randolph street is either in the company or in the State. We maintain that the title is vested in the company, on grounds already sufficiently explained. (See points III. and VIII). The title is derived from the grant made by the State in the company's charter. It was confirmed by the confirmatory clause in the Act of 1869, which has been held in this case to be valid and irrevocable. By the same clause the company is recognized as the riparian owner.

But whether the legal title is in the company or the State, it is, we respectfully submit, perfectly clear that the city has no estate in the premises, either legal or equitable, and is entitled therefore to none of the littoral or riparian rights which attach to the land next to the water.

XVI. If the State is bound by the Act of 1869, the information in this case must be dismissed.

The State is entitled to no relief unless it has the legal title and right of possession to some part of the premises in controversy. With the exception of the small triangular piece of ground next to Randolph street described in the ordinance of September 10, 1855 (*ante*, pp. 19, 20), and the dock or slip near the foot of Sixteenth street, which has been completed in accordance with the terms of the decree, (*ante*, pp. 30, 52), all the lands occupied by the company, which are involved in this litigation, are within the limits of the grant made in the Act referred to, or within the operation of the confirmatory clause contained in that Act. The submerged lands in dispute lying east of the breakwater, are also within the limits of the grant.

The small triangle next to Randolph street was occupied by the company, with the consent of the common council, in 1855. The consent was granted on conditions which have been already explained. (See point V). The right of the company to retain possession of it, under the provisions of its charter (See point III), is too clear to require further argument.

With respect to the dock or slip near the foot of Sixteenth street, it appears that a new breakwater was erected by the company at a short distance from the shore, to replace the old structure, which had fallen into decay (*ante*, p. 30) ; and a slip of small size has been constructed between the breakwater and the shore, where vessels may enter to receive and discharge their cargoes. The company is the owner of the land on the shore (see *ante*, p. 19), and has the same littoral rights as would belong to any other owner of the same land. The work is injurious to no one, nor is it an unlawful encroachment on the domain of the State. (See point VI.)

It was adjudged by the court below (*ante*, p. 50), that the railroad company is the owner in fee of all the wharves, piers and other works constructed by it east of its main tracks, between Park Row and Sixteenth street; and that it is also entitled to the use in perpetuity of all the ground it has possession of between Park Row and Randolph street. The right of the company to complete the slip near the foot of Sixteenth street was also expressly affirmed. (*Ante*, p. 52). If this ruling shall be sustained, and the State is bound by the Act of 1869, it is clear that no encroachment has been either made or threatened by the company upon the domain of the State, and this suit cannot be maintained.

XVII. The title of the railroad company to the land it has reclaimed from the lake does not depend altogether upon the grants made in 1869. It was held in the court below, that the

company's right to the possession and use of this land was clear upon other grounds, and the decision is undoubtedly correct.

A large part of the reclaimed land is within the limits prescribed in the ordinance of 1852, which, as has been seen (point IV), was ratified and confirmed by the legislature in 1861.

The piers and slips north of Randolph street, were constructed in front of the company's land on the shore. The right of a riparian proprietor to erect wharves in the shoal water of the lake adjacent to his land, has been so often affirmed by this court, that the subject is no longer open to controversy. (See point VI). The right does not depend upon title to the soil under the water, but may be exercised to the same, and no greater, extent, whether the fee be in the riparian proprietor or in the State. The plan for the exterior piers 1, 2 and 3, was submitted for approval to the War Department, which has exclusive control of the harbor, and, after reference to a board of engineer officers and their report thereon, received its official sanction. (*Ante*, pp. 27–29). No law of the State was infringed in making these improvements, nor is it pretended that they are an obstruction to the public right of navigation. They are, on the contrary, essential aids to navigation and conducive to the purposes for which the harbor was intended.

The erection of the wharf at the foot of Thirteenth street was also authorized by the War Department. (*Ante*, p. 30). This structure, as well as the pier built in 1870 to replace the old breakwater between Twelfth street and a prolongation of the north line of lot 21, which had fallen into decay, is in front of land on the shore to which the company has an undisputed title.

The larger part of the triangular space at the foot of Washington and Madison streets, outside the breakwater of 1869, which was filled in by the company in 1873, is within the area designated in the ordinance of 1852, and the use of the whole is indispensable to the convenient operation of the railroad.

By the express terms of its original charter, the company was authorized to enter upon and take possession of any lands or waters belonging to the State, which are necessary to the complete operation of its road. (See point III.) That the use of all the land which has been reclaimed from the lake, is, in fact, necessary to the efficient operation of the railroad, is conclusively shown by the evidence. (See *ante*, p. 31.)

It may be said that other railroad companies have been permitted to use the Illinois Central tracks and grounds, and that more land is needed for handling the business than would otherwise be required. It appears that when the testimony was taken two companies were thus accommodated. One of them (the Michigan Central) owns the freight grounds it occupies, and an equal interest with the Illinois Central Company in the old passenger station-house. It also uses the Illinois Central tracks in the passage of its trains to and from the city —the compensation paid for their use being fixed at a certain sum for each passenger and every ton of freight carried. This arrangement has existed since the railroad was first opened. The other company (the Baltimore and Ohio) was provided with temporary accommodations (since terminated) of a similar character. (Rec., 378–9, 382, 386–7.) Neither of these companies has ever occupied a foot of ground outside the breakwater of 1869. The piers which have been built north of Randolph street and at the foot of Thirteenth street have never been used by either.

The public are not injured by furnishing such accommodations to other companies; nor has the Illinois Central Company,

in what has been done, exceeded its lawful powers. All uses of railroad tracks and terminal grounds are legitimate which are authorized by law, and by the laws of Illinois such accommodations may be lawfully granted. It is no objection even to the exercise of the right of eminent domain, that the necessity of acquiring additional land is caused by furnishing trackage or depot accommodations to other companies. In such case the necessities of a lessee are considered in law as the necessities of the lessor company, and it is held that a lessee may prosecute proceedings of condemnation in the name of the lessor when the public necessity requires it.

Chicago and W. I. R. R. Co., v. *Ills. Central R. R. Co.*, 113 Ill., 156, 166.

Chicago, R. I. and P. Ry. Co. v. *Smith*, 111 Ill., 364.

City of Chicago v. *Chicago and W. I. R. R Co.*, 105 Ill., 74.

Chicago and W. I. R. R. Co. v. *Dunbar*, 100 Ill., 112, 137–8.

Kip v. *New York and Harlem R. R. Co.*, 67 N. Y., 227.

Matter of Staten Island Rapid Transit Co., 103 N. Y., 251.

See also:

Lake Superior and M. R. R. Co. v. *United States*, 93 U. S., 442, 446.

XVIII. The railroad company is lawfully entitled to the enjoyment of other rights, in no way dependent upon the Act of 1869, of which it is improperly deprived by the decree entered in the court below.

The company is the lawful owner of the land bordering on the lake between Park Row and Sixteenth street, and as such

owner has all the ordinary rights of a littoral or riparian proprietor with regard to the adjacent waters; it stands in the same situation with respect to such rights as the former owner.

Swinton Water Works Co. v. *Wilts and Berks Canal Co.*, L. R. 7 Eng. and Ir. Ap. Cases, 697.

Same case, L. R. 9 Chan. Ap. Cases, 451.

Hanford v. *St. Paul and D. R. Co.*, 43 Minn., 104.

One of the rights incident to land so situated, is to build and maintain suitable landing places, wharves and piers in the water in front of it. It is a right, no doubt, subject to certain limitations. It must be exercised in subordination to the public right of navigation, and it is also subject, perhaps, to such reasonable regulations and restrictions as the legislature by virtue of its general governmental power may think proper to establish. It is, nevertheless, a right which belongs to the land, and it is valuable. It is a property right which cannot be taken, even for public use, without compensation.

No restrictions on the exercise of the right have been imposed by the legislature of Illinois; but any further exercise of it by the riparian proprietor in this case, under any circumstances, is absolutely prohibited by the decree of the court below.

It is easily conceivable, and indeed extremely probable, that, even in the near future, additional wharves and slips will be required on this part of the shore for the suitable accommodation of lake commerce, from which the railroad company would also derive important advantages. No one but the riparian proprietor has the right to make such improvements, and, upon the case made by the pleadings and evidence, a decree which pro-

hibits the construction of suitable and necessary works of this character cannot be justified.

The company is also prohibited by the decree from taking possession of the hitherto unoccupied portion of the strip three hundred feet wide, described in the ordinance of 1852. Attention has been called to this point on a preceding page (see point IV), where we have endeavored to show that the rights of the company have not been forfeited by abandonment or non-user. The ordinance of 1852 was ratified by the legislature in 1861, and is of perpetual obligation. As between the company and the city or the State, the right of the former to the use of the entire strip is as perfect to-day as when the right first accrued. There are no equitable grounds on which the company can be deprived of any part of it.

The power of the War Department to determine whether, regard being had to the interests of commerce, the railroad company can be permitted to occupy any more land in the harbor, and, if so, upon what conditions, is not disputed. But this is a separate matter, which should be left for adjustment to the United States authorities in charge of the harbor. The State has no lawful control over such questions, and should not be placed in a position by the decree which will frustrate all hopes of making a satisfactory arrangement advantageous to all the large interests concerned.

The exceptions taken to that part of the decree by which the city is invested with title to the land occupied by the railroad company between Randolph street and Park Row, and the consequent right to construct wharves and docks in front of it, should also be sustained. It is impossible to hold, consistently with settled principles (see point XV), that the city has any interest, either legal or equitable, in the premises referred to.

Finally, we insist that the Act of 1869 opposes an impregnable barrier to the pretensions of both the State and the city. The objections raised to the validity of the Act are wholly devoid of legal merit; and to revoke the grants made by it, was beyond the constitutional power of the legislature.

BENJAMIN F. AYER,
Of Counsel for Appellant.

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BENJAMIN F. AYER,
Of Counsel for Appellant.

146 U.S. 387

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Circuit Court of the United States.

NORTHERN DISTRICT OF ILLINOIS.

STATE OF ILLINOIS
vs.
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CITY OF CHICAGO
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UNITED STATES
vs.
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OPINION OF MR. JUSTICE HARLAN.

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OPINION OF MR. JUSTICE HARLAN.

HARLAN, J.:

The first of the above-named causes is a suit in equity in the name of the people of the State of Illinois against the Illinois Central Railroad Company, the city of Chicago, and the United States of America. It was commenced in the circuit court of Cook County, Ill., and subsequently, on the petition of the railroad company, was removed into this court. A motion to remand the cause was denied upon grounds indicated in *State* v. *Railroad Company*, 16 Fed. Rep., 881. The railroad company and the city filed answers, and the latter also filed a crossbill for affirmative relief against the State and its codefendants. To that crossbill the company filed an answer, as did also the attorney-general of Illinois in behalf of the State. The United States has not appeared, either in the original or cross suit. This cause may be regarded as under submission for final decree as between the State, the railroad company, and the city in the original suit; also as between the city and the railroad company in the cross suit. Notwithstanding the appearance in the cross suit of the attorney-general of Illinois in behalf of the State, some question is made as to the jurisdiction of the court to give to the city any affirmative relief against the State. But that question need not be decided, since all the issues between the State and the city can be finally determined in the original suit brought by the State. The last named of the causes is an information in equity by the United States against the Illinois Central Railroad Company, the Michigan Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, the Baltimore and Ohio Railroad Company,

and the city of Chicago. That case is now before us upon demurrer by the two first named companies to the information.

The general object of these suits is to obtain a judicial determination of the rights of the parties in respect to certain lands on the east or lake front of the city of Chicago, south of Chicago River, upon some of which are tracks, depots, warehouses, piers, and other structures erected by the Illinois Central Railroad Company; and also in respect to the submerged lands within the limits of the city of Chicago and of the State of Illinois, "constituting the bed of Lake Michigan, and lying east of the tracks and breakwater" of that company, "for the distance of 1 mile, and between the south line of the south pier [near Chicago River] extended eastwardly, and a line extended eastward from the south line of lot 21, south of and near the roundhouse and machine shops of said company." The cases, besides, involve an inquiry as to the right of the railroad company, for the promotion as well of its own business as of commerce and navigation generally, to erect and maintain wharves, piers, and docks in the harbor of Chicago. Some of these lands were formerly a part of what was known as "Fort Dearborn military post," or the southwest quarter of fractional section 10, near the mouth of Chicago River; others, a part of fractional section 15; while others are in section 22—all of said sections being in township 39 N., range 14 E. of the third principal meridian, and on the shore of Lake Michigan, in the order named. It is necessary to a clear understanding of the numerous questions presented for determination that we should first trace the history of the title to these several bodies of lands up to the time when the Illinois Central Railroad was located within the limits of Chicago.

1. *As to the lands embraced in the Fort Dearborn reservation.* In the year 1804 the United States established the military post of Fort Dearborn immediately south of Chicago River and near its mouth, upon the SW. fractional quarter of section 10. It was occupied by troops as well when Illinois, in 1818, was admitted into the Union as when Congress passed the act of March 3, 1819, authorizing the sale of certain military sites. By that act it was provided "that the Secretary of War be, and he is hereby, authorized, under the direction of the President of the United States, to cause to be sold such military sites, belonging to the United States, as may have been found or become useless for military purposes. And the Secretary of War is hereby authorized, on the payment of the consideration agreed for into the Treasury of the United States, to make, execute, and deliver all needful instruments conveying and transferring the same in fee; and the jurisdiction which had been specially ceded, for military purposes, to the United States by a State, over such site or sites, shall thereafter cease." (3 Stat., 520.) In 1824, upon the written request of the Secretary of War, the SW. quarter of fractional section 10, containing about 57 acres, and within which Fort Dearborn was situated, was

formally reserved by the Commissioner of the General Land Office from sale, and for military purposes. (*Wilcox* v. *Jackson*, 13 Pet., 499, 452.)

The United States admit, and it is also proved, that the lands so reserved were subdivided in 1837, by authority of the Secretary—he being represented by one Matthew Birchard as special agent and attorney for that purpose—into blocks, lots, streets, and public grounds, called the "Fort Dearborn addition to Chicago." And on the 7th day of June, 1839, a map or plat of that addition was acknowledged by Birchard as such agent and attorney, and was recorded in the proper local office. A part of the ground embraced in that subdivision was marked on the recorded plat, "Public ground, forever to remain vacant of buildings." The plat of that subdivision, called "Map A," is reproduced, and in the margin will be found the certificates which appear on the plat as made and recorded.*

* Fort Dearborn addition to Chicago, as represented on the adjacent plat, is laid out into blocks, lots, and streets upon, and embraces the whole of, the southwest fractional quarter of section ten (10), township thirty-nine (39) north, range No. fourteen (14) east of the 3d principal meridian. The largest figures on said plat indicate the number of the blocks. The next smaller figures, near the center of the lots, show the number of the lots, respectively, in each block. The next size of figures, still smaller, in the interior side of the boundary of the several streets, and on the division lines of the lots, represent the measurement of the respective lots in feet and inches. The figures written transversely to and in the streets and alleys show the width of the same in feet at different points, and the figures on the exterior lines of the blocks represent the measurement of the blocks upon which they stand. From the west boundary of the said fraction of section ten (10) is laid off and appropriated 60 feet in width, as an addition to State street; and from the south boundary of said section 40 feet as an addition to Madison street. The width of the rear of the water lots bounded upon the Chicago River is determined and established by posts set at the intersection of the lines of the lots and streets, with meanders of the river, as shown by the notes thereof entered upon the meander lines. The lines between the lots in block (2) are run at right angles to the N. W. line of River street. The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description. At the S. E. corner of block (13) at the angle of Wabash and Washington streets is set a lime-stone, 4 by 6 inches, and 2 feet long, at least 18 inches below the natural surface of the ground; also another stone of similar description is set at the angle formed by the junction of River with South Water street, in block (3); and also one other stone of like dimensions at the N. E. corner of block (7), at the angle of South Water street and Michigan avenue. At the corner of sections 9, 10, 15, and 16, is a stone near the center of State street, which was set by the commissioners of the Illinois and Michigan canal in 1836. The bearing of South Water, Lake, Randolph, and Washington is N. 83° E. The bearing or course of Madison street is N. 82° E. The course of River street from South Water street to Harbor street is N. 29° E; thence to Lake Michigan, N. 83° E. Course of State and Wabash streets and Michigan avenue is N. 8° 5′ W. All bearings were taken without any variations of the compass.

For J. R. POINSETT, *Sec. at War.*
M. BIRCHARD, *Agent & Atty.*

STATE OF ILLINOIS, *Cook County:*

Be it remembered that on this seventh day of June, in the year of our Lord one thousand eight hundred and thirty-nine, before me, Henry Brown, a [illegible]

and the city of Chicago. That case is now before us upon demurrer by the two first named companies to the information.

The general object of these suits is to obtain a judicial determination of the rights of the parties in respect to certain lands on the east or lake front of the city of Chicago, south of Chicago River, upon some of which are tracks, depots, warehouses, piers, and other structures erected by the Illinois Central Railroad Company; and also in respect to the submerged lands within the limits of the city of Chicago and of the State of Illinois, "constituting the bed of Lake Michigan, and lying east of the tracks and breakwater" of that company, "for the distance of 1 mile, and between the south line of the south pier [near Chicago River] extended eastwardly, and a line extended eastward from the south line of lot 21, south of and near the roundhouse and machine shops of said company." The cases, besides, involve an inquiry as to the right of the railroad company, for the promotion as well of its own business as of commerce and navigation generally, to erect and maintain wharves, piers, and docks in the harbor of Chicago. Some of these lands were formerly a part of what was known as "Fort Dearborn military post," or the southwest quarter of fractional section 10, near the mouth of Chicago River; others, a part of fractional section 15; while others are in section 22—all of said sections being in township 39 N., range 14 E. of the third principal meridian, and on the shore of Lake Michigan, in the order named. It is necessary to a clear understanding of the numerous questions presented for determination that we should first trace the history of the title to these several bodies of lands up to the time when the Illinois Central Railroad was located within the limits of Chicago.

1. *As to the lands embraced in the Fort Dearborn reservation.* In the year 1804 the United States established the military post of Fort Dearborn immediately south of Chicago River and near its mouth, upon the SW. fractional quarter of section 10. It was occupied by troops as well when Illinois, in 1818, was admitted into the Union as when Congress passed the act of March 3, 1819, authorizing the sale of certain military sites. By that act it was provided "that the Secretary of War be, and he is hereby, authorized, under the direction of the President of the United States, to cause to be sold such military sites, belonging to the United States, as may have been found or become useless for military purposes. And the Secretary of War is hereby authorized, on the payment of the consideration agreed for into the Treasury of the United States, to make, execute, and deliver all needful instruments conveying and transferring the same in fee; and the jurisdiction which had been specially ceded, for military purposes, to the United States by a State, over such site or sites, shall thereafter cease." (3 Stat., 520.) In 1824, upon the written request of the Secretary of War, the SW. quarter of fractional section 10, containing [illegible] acres, and within which Fort Dearborn was situated, was

formally reserved by the Commissioner of the General Land Office from sale, and for military purposes. (*Wilcox* v. *Jackson*, 13 Pet., 499, 452.)

The United States admit, and it is also proved, that the lands so reserved were subdivided in 1837, by authority of the Secretary—he being represented by one Matthew Birchard as special agent and attorney for that purpose—into blocks, lots, streets, and public grounds, called the "Fort Dearborn addition to Chicago." And on the 7th day of June, 1839, a map or plat of that addition was acknowledged by Birchard as such agent and attorney, and was recorded in the proper local office. A part of the ground embraced in that subdivision was marked on the recorded plat, "Public ground, forever to remain vacant of buildings." The plat of that subdivision, called "Map A," is reproduced, and in the margin will be found the certificates which appear on the plat as made and recorded.*

* Fort Dearborn addition to Chicago, as represented on the adjacent plat, is laid out into blocks, lots, and streets upon, and embraces the whole of, the southwest fractional quarter of section ten (10), township thirty-nine (39) north, range No. fourteen (14) east of the 3d principal meridian. The largest figures on said plat indicate the number of the blocks. The next smaller figures, near the center of the lots, show the number of the lots, respectively, in each block. The next size of figures, still smaller, in the interior side of the boundary of the several streets, and on the division lines of the lots, represent the measurement of the respective lots in feet and inches. The figures written transversely to and in the streets and alleys show the width of the same in feet at different points, and the figures on the exterior lines of the blocks represent the measurement of the blocks upon which they stand. From the west boundary of the said fraction of section ten (10) is laid off and appropriated 60 feet in width, as an addition to State street; and from the south boundary of said section 40 feet as an addition to Madison street. The width of the rear of the water lots bounded upon the Chicago River is determined and established by posts set at the intersection of the lines of the lots and streets, with meanders of the river, as shown by the notes thereof entered upon the meander lines. The lines between the lots in block (2) are run at right angles to the N. W. line of River street. The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description. At the S. E. corner of block (13) at the angle of Wabash and Washington streets is set a lime-stone, 4 by 6 inches, and 2 feet long, at least 18 inches below the natural surface of the ground; also another stone of similar description is set at the angle formed by the junction of River with South Water street, in block (3); and also one other stone of like dimensions at the N. E. corner of block (7), at the angle of South Water street and Michigan avenue. At the corner of sections 9, 10, 15, and 16, is a stone near the center of State street, which was set by the commissioners of the Illinois and Michigan canal in 1836. The bearing of South Water, Lake, Randolph, and Washington is N. 83° E. The bearing or course of Madison street is N. 82° E. The course of River street from South Water street to Harbor street is N. 29° E; thence to Lake Michigan, N. 83° E. Course of State and Wabash streets and Michigan avenue is N. 8° 5′ W. All bearings were taken without any variations of the compass.

For J. R. POINSETT, *Sec. at War.*
M. BIRCHARD, *Agent & Atty.*

STATE OF ILLINOIS, *Cook County:*

Be it remembered that on this seventh day of June, in the year of our Lord one thousand eight hundred and thirty-nine, before me, [illegible]

The lots designated on this plat were sold and conveyed by the United States to different purchasers. The sale and conveyance (to use the words of the information filed by the United States) was "by and according to the said plat, and with reference to the same." But it should be stated that at the time of the first sales the United States expressly reserved from sale all of the Fort Dearborn addition (including the ground marked for streets) north of the south line of lot 8 in block 2, lots 4 and 9 in block 4, and lot 5 in block 5, projecting said lines across the adjacent streets. The grounds so specially reserved remained in the occupancy of the General Government for military purposes from 1839 until after 1845. The legal effect of that occupancy appears in *United States* v. *Chicago*, 7 How., 185. The city of Chicago having proposed, in 1844, to open Michigan avenue through the lands so reserved from sale, notwithstanding at the time they were in actual use for military purposes, the United States instituted a suit in equity to restrain the city from so doing. It appeared in the case that the agent of the General Government gave notice, at the time of selling the other lots, that the ground in actual use by the United States was not then to be sold. It also appeared that the act of March 4, 1837, incorporating the city of Chicago, and designating the district of country embraced within its limits, expressly excepted "the southwest fractional quarter of section 10, occupied as a military post, *until the same shall become private property.*" (Laws Ill. 1837, pp. 38, 74.) The court held that the city had no right to open streets through that part of the ground which, although laid out in lots and streets, had not been sold by the Government; that its corporate powers were limited to the part which, by sale, had become private property; and that the streets laid out and dedicated to public use by Birchard, the agent of the Secretary of War, did not, merely by his surveying the land into lots and streets, and making and recording a map or plat thereof, convey the legal estate in such streets to the city, and thereby authorize it to open them for public use, and assume full municipal control thereof. The court held to be untenable the claim of the city that "because streets had been laid down on the plan by the agent (Birchard), part of which extended into the land not sold, those parts had, by this alone, become dedicated as highways, and the United States had become estopped to object." Further: "It is

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peace in and for said county, came Matthew Birchard, solicitor of the general land-office and agent of the War Department of the United States, to me personally known, and exhibited a power of attorney from the Secretary of the Department of War of the United States, executed officially by said Secretary under the seal of said Department, by direction of the President of the United States, authorizing him, the said Matthew Birchard, to cause to be surveyed, platted, duly acknowledged, and recorded as an addition to the town of Chicago, Illinois, the southwest fractional quarter of section ten, heretofore reserved for military purposes, and the site of Fort Dearborn, and the same to sell, etc., and acknowledged the foregoing map to be the map and plat of the Fort Dearborn addition to the town of Chicago, and that the United States of America are the sole proprietors and the owners of the same.

HENRY BROWN, *Justice of the Peace.*

entirely unsupported by principle or precedent that an agent, *merely by protracting on the plan* those streets into the reserved line, and amidst lands not sold, nor meant then to be sold, but expressly reserved, could deprive the United States of its title to real estate, and to its important public works." See, also, *Irwin* v. *Dixin*, 9 How., 31.

2. *As to the lands in controversy embraced in fractional section 15.* This section is on the lake shore, immediately south of section 10. The particular lands, the history of the title to which is to be now examined, are between the west line of the street now known as "Michigan avenue," and the roadway or way-ground of the Illinois Central Railroad Company, and between the middle line of Madison street and the middle line of Twelfth street, excluding what is known as "Park Row," or block 23, north of Twelfth street. By an act of the Illinois legislature of February 14, 1823, entitled "An act to provide for the improvement of the internal navigation of this State," certain persons were constituted commissioners to devise and report upon measures for connecting, by means of a canal and locks, the navigable waters of the Illinois River and Lake Michigan. (Laws Ill. 1823, p. 151.) This was followed by an act of Congress, approved March 2, 1827, entitled "An act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan," granting to this State, for the purposes of such enterprise, a quantity of land, equal to one-half of five sections in width, on each side of the proposed canal (reserving each alternate section to the United States), to be selected by the Commissioner of the General Land Office, under direction of the President; said lands to be "subject to the disposal of the said State for the purpose aforesaid, and for no other;" and said canal to remain forever a public highway for the use of the national Government, free from any charge for any property of the United States passing through it. (4 St. 534, c. 51.) The power of the State to dispose of these lands was further recognized or conferred by the third section of the act, as follows:

SEC. 3. That the said State, under the authority of the legislature thereof, after the selection shall have been so made, shall have power to sell and convey the whole or any part of the said land, and to give a title in fee simple therefor to whomsoever shall purchase the whole or any part thereof. (4 St. 234.)

By an act of the Illinois legislature of January 22, 1829, entitled "An act to provide for constructing the Illinois and Michigan Canal," the commissioners for whose appointment that act made provision were directed to select, in conjunction with the Commissioner of the General Land Office, the alternate sections of land granted by the act of Congress; such commissioners being invested with the power, among others, "to lay off such parts of said donation *into town lots as they may think proper*, and *to sell the same at public sale* in the same manner as is provided in this act for the sale of other lands." (Laws Ill. 1829.) The act of 1829 was amended February 15, 1831, so as to constitute

the canal commissioners a board, to be known as the "Board of Canal Commissioners of the Illinois and Michigan Canal," with authority to contract and be contracted with, sue and be sued, plead and be impleaded, and with power of control in all matters relating to said canal. (Laws Ill. 1830–'31, p. 39.) Pursuant to and in conformity with said acts of Congress and of the legislature of Illinois, the selection of lands for the purposes specified was made by the proper authorities, and approved by the President on the 21st of May, 1830. Among the lands so selected was said fractional section 15. By an act of the Illinois legislature, approved January 9, 1836, entitled "An act for the construction of the Illinois and Michigan Canal," the governor was empowered to negotiate a loan of not exceeding $500,000, on the credit and faith of the State, as therein provided, for the purpose of aiding, in connection with such means as might be received from the United States, in the construction of the Illinois and Michigan Canal, for which loan should be issued certificates of stock, to be called the "Illinois and Michigan Canal Stock," signed by the auditor, and countersigned by the treasurer, bearing an interest not exceeding 6 per cent, payable semiannually, and "reimbursable" at the pleasure of the State at any time after 1860; and for the payment of which, principal and interest, the faith of the State was irrevocably pledged. The same act provided for the appointment of three commissioners, to constitute a board to be known as "The Board of Commissioners of the Illinois and Michigan Canal," and to be a body politic and corporate, with power to contract and be contracted with, sue and be sued, plead and be impleaded, in all matters and things relating to them as canal companies, and to have the immediate care and superintendence of the canal, and all matters relating thereto. (Laws Ill. 1836, p. 145.) That act contained, among other provisions, the following:

SEC. 32. The commissioners shall examine the whole canal route, and select such places thereon as may be eligible for town-sites, and cause the same to be laid off into town lots, and *they shall cause the canal lands in or near Chicago, suitable therefor, to be laid off into town lots.*

SEC. 33. And the said board of canal commissioners shall, on the 20th day of June next, proceed to sell the lots in the town of Chicago, and such parts of the lots in the town of Ottowa, *as also fractional section fifteen adjoining the town of Chicago, it being first laid off and subdivided into town lots, streets, and alleys,* as in their best judgment will best promote the interest of the said canal fund: provided always, that before any of the aforesaid town lots shall be offered for sale, public notice of such sale shall have been given. * * * (Laws Ill. 1836, p. 149.)

The revenue arising from the canal, and from any lands granted by the United States to the State for its construction, together with the net tolls thereof, were pledged by the act for the payment of the interest accruing on the said stock, and for the reimbursement of the principal of the same. (Laws Ill. 1836, p. 153.) In 1836, the canal commissioners, under the authority conferred upon them by the statutes above recited, caused fractional section 15 to be subdivided into lots, blocks, streets, etc., a map whereof was made, acknowledged, and recorded on the

20th of July, 1836. A map (the official certificates as they appear on the original map as recorded being in the margin*) is reproduced as "Map B."

STATE OF ILLINOIS,
Cook County, ss:

We, the undersigned, commissioners of the Illinois and Michigan Canal, in pursuance of the statute in such case made and provided, have caused fractional section number fifteen (15), township thirty-nine north, range fourteen east, adjoining or cornering with the original town of Chicago, to be laid off into lots, etc., as appears by the above plat. Planted stones as designated at different corners, from which to make future surveys. And we do hereby acknowledge the same the full width and length of the lots, and width of the streets and avenues, as marked, delineated, and laid down, as and for the true plat or map of the subdivision of said section.

Given under our hands and seals at Chicago, the thirteenth day of June, A. D. 1836.

[Signed] W. F. THORNTON. [SEAL.]
["] W. B. ARCHER. [SEAL.]
["] G. S. HUBBARD. [SEAL.]

RECORDER'S OFFICE,
Cook County, Illinois, ss:

I certify that the foregoing map of fractional section 15 was filed for record on the 18th day of June, 1836, and was duly recorded on the 20th day of July, 1836, in Book H, page 230.

[Signed] RICHARD J. HAMILTON,
Recorder Cook County, Illinois.

STATE OF ILLINOIS,
County of Cook, ss:

On this thirteenth day of June, in the year one thousand eight hundred and thirty-six, personally appeared before the undersigned, one of the justices of the supreme court of the State of Illinois, W. F. Thornton, W. B. Archer, and G. S. Hubbard, known to the undersigned to be the same persons who have signed and sealed this map, who severally acknowledged the same to be the true and original map of fractional section number fifteen, township thirty-nine north, range fourteen east of the third principal meridian, as surveyed and subdivided by them pursuant to law.

Given at Chicago the day and year before recited.

[Signed] THEOPHILUS W. SMITH.

I, Edward B. Talcott, assistant engineer in the employment of the board of commissioners of the Illinois and Michigan Canal, do hereby certify that the above is a correct plat or map of fractional section number fifteen, township thirty-nine north, range fourteen east of the third principal meridian, adjoining or cornering with the original town of Chicago, as subdivided and laid off into lots, etc., under the direction of said board of commissioners, and that the same portrays and sets forth the size, width, and length of the lots, also the true and fixed width of the streets and avenues. The letter "S" at the corners of the section and blocks, as marked, denotes where stones are planted deep in the ground, from which to make future surveys.

Given under my hand at Chicago, the 13th day of June, A. D. 1836.

[Signed] EDWARD B. TALCOTT, *Assistant Engineer.*

Filed June 18, 1836.

I, Robert Milne, secretary of the board of canal commissioners, certify that the above map or plat, with the certificates annexed of W. F. Thornton, W. B. Archer, and G. S. Hubbard, Edward B. Talcott, assistant engineer, Richard J. Hamilton, recorder, and Theophilus W. Smith, is a true copy of the original now in this office.

Witness my hand and the seal of the board of canal commissioners, this 19th day of February, A. D. 1873.

[Signed] ROBERT MILNE, *Secretary.*

CANAL OFFICE, *Lockport, Illinois, February 19, 1873.*

It is proper to say that upon some of the maps in evidence, and duly certified, the words "Michigan avenue" are nearer to the shore line than they appear to be on Map B. This fact tends to show that the entire space between the shore line and the lots into which fractional section 15 was subdivided was originally intended as an avenue, or public grounds or commons. At the time this map was made and recorded, fractional sections 15 and 10 were both within the limits of the "town" of Chicago, except that by the act of February 11, 1835, changing the corporate powers of that town, it was provided "that the authority of the board of trustees of the said town of Chicago shall not extend over the south fractional section 10 until the same shall cease to be occupied by the United States." (Laws Ill. 1835, p. 204.) But prior to the survey and recording of the plat of fractional section 10, to wit, by the act of March 4, 1837, the city of Chicago was incorporated, and its limits defined (excluding, as we have seen, "the southwest fractional quarter of section 10, occupied as a military post, until the same shall become private property"), and was invested with all the estate, real and personal, belonging to or held in trust by the trustees of the town; its common council being empowered to lay out, make, and assess streets, alleys, lanes, and highways in said city, to make wharves and slips at the end of the streets, on property belonging to said city, and to alter, widen, straighten, and discontinue the same. (Laws Ill. 1837, p. 61, § 38; Id., p. 74, § 61.)

This brings us, in the chronological order of events relating to this litigation, to the incorporation of the Illinois Central Railroad Company, and the location of its road within the limits of the city of Chicago. Congress having, by an act approved September 20, 1850 (9 St. 466, c. 61), made a grant of land to Illinois for the purpose of aiding the construction of a railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with branches to Chicago and Dubuque, the Illinois Central Railroad Company was incorporated February 10, 1851, and made the agent of the State to construct that road. (Priv. Laws Ill. 1851, p. 61.) It was granted power by its charter "to survey, locate, construct, complete, alter, maintain, and operate a railroad, with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan; and also a branch, via the City of Galena, to a point on the Mississippi River opposite the town of Dubuque, in the State of Iowa." In addition to certain powers, privileges, immunities, and franchises—including the right to purchase, hold, and convey real and personal estate, which might be needful to carry into effect the purposes and objects of its charter—it was provided that the company "shall have the right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon, and take possession of, and use, all and singular, any lands, streams,

and materials of every kind for the location of depots and stopping stages, for the purposes of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road. All such lands, waters, materials, and privileges *belonging to the State* are hereby granted to said corporation for said purposes: * * * provided, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams. (Section 3.) But the company's charter also provided (section 8): "*Nothing in this act contained shall authorize said corporation to make a location of their tract within any city without the consent of the common council of said city.*"

Such consent was given by an ordinance of the common council of Chicago, adopted June 14, 1852, whereby permission was granted to the company to lay down, construct, and maintain within the limits of that city, and along the margin of the lake within and adjacent to the same, a railroad with one or more tracks, and to have the right of way and all powers incident to and necessary therefor, upon certain terms and conditions, to wit: "The said road shall enter at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as 'Lake Park,' in front of canal section fifteen, and continue northerly *across the open space in front of said section fifteen*, to such grounds as the said company may acquire between the north line of Randolph street and the Chicago River, in the Fort Dearborn addition in said city; upon which said grounds shall be located the depot of said railroad within the city, and such other buildings, slips, or apparatus as may be necessary and convenient for the business of said company. But it is expressly understood that the city of Chicago does not undertake to obtain for said company any right of way or other right, privilege, or easement not now in the power of said city to grant or confer, or to assume any liability or responsibility for the acts of said company." (Section 1.) By other sections of the ordinance it was provided as follows: By the second section, that the company might "enter upon and use in perpetuity for its said line of road, and other works necessary to protect the same from the lake, a width of 300 feet, from the southern boundary of said public ground near Twelfth street to the northern line of Randolph street; the inner or west line of the ground to be used by said company to be not less than 400 feet east from the west line of Michigan avenue and parallel thereto." By the third section, that they "may extend their works and fill out into the lake to a point in the southern pier not less than 400 feet west from the present east end of the same, thence parallel with Michigan avenue to the north line of Randolph street extended; but it is expressly understood that the common council does not grant

any right or privilege beyond the limits above specified, nor beyond the line that may be actually occupied by the works of said company." By the sixth section, that the company "shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore, as the same is hereinbefore defined, such suitable walls, fences, or other sufficient works as will prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger; such structure to be of suitable materials and sightly appearance, and of such heights as the common council may direct, and no change thereon shall be made except by mutual consent: *Provided*, That the company shall construct such suitable gates at proper places at the ends of the streets, which are now or may hereafter be laid out, as may be required by the common council, to afford safe access to the lake: *And provided also*, That in case of the construction of an outside harbor, streets may be laid out to approach the same, in the manner provided by law; in which case the common council may regulate the speed of locomotives and trains across them." By the seventh section, that the company "shall erect and complete within three years after they shall have accepted this ordinance, and shall forever thereafter maintain, a continuous wall or structure of stone masonry, pier-work, or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan avenue opposite thereto, from the north side of Randolph street to the southern bound of Lake Park before mentioned, at a distance of not more than 300 feet east from and parallel with the western or inner line pointed out for said company, as specified in section 2 hereof, and shall continue said works to the southern boundary of the city, at such distance outside of the track of said road as may be expedient; which structure and works shall be of sufficient strength and magnitude to protect the entire front of said city, between the north line of Randolph street and its southern boundary, from further damage or injury from the action of the waters of Lake Michigan; and that part of the structure south of Lake Park shall be commenced and prosecuted with all reasonable dispatch after acceptance of this ordinance." By the eighth section, that the company "shall not in any manner, nor for any purpose whatever, occupy, use, or intrude upon the open ground known as 'Lake Park,' belonging to the city of Chicago, lying between Michigan avenue and the western or inner line before mentioned, except so far as the common council may consent, for the convenience of said company, while constructing or repairing works in front of said ground." By the ninth section, that the company "shall erect no buildings between the north line of Randoph street and the south line of said Lake Park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of or for making up or distributing their trains, nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor suffer their locomotives,

cars, or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks and protection of the same." The company was given ninety days within which to accept the ordinance, and it was provided that, upon such acceptance, its terms should be embodied in a contract between the city and the company. The ordinance was accepted and the required agreement entered into on the 8th day of July, 1852.

At the time this ordinance was passed the harbor of the city included, under the laws of the State incorporating the city, "the piers and so much of Lake Michigan as lies within the distance of 1 mile thereof into the lake, and the Chicago River and its branches to their respective sources." (Laws Ill., 2d Sess., 1849 and 1851, pp. 132, 147.) Its common council had power, at the public expense, to construct a breakwater or barrier along the shore of the lake for the protection of the city against the encroachments of the water; "to preserve the harbor; to prevent any use of the same, or any act in relation thereto, * * * tending in any degree to fill up or obstruct the same; to prevent and punish the casting or depositing therein any earths, ashes, or other substance, filth, logs, or floating matter; to prevent and remove all obstructions therein, and to punish the authors thereof; to regulate and prescribe the mode and speed of entering and leaving the harbor, and of coming to and departing from the wharves and streets of the city by steam boats, canal boats, and other crafts and vessels; * * * and to regulate and prescribe by such ordinances, or through their harbor master, or other authorized officer, such a location of every canal boat, steamboat, or other craft or vessel or float, and such changes of station in and use of the harbor as may be necessary to promote order therein and the safety and equal convenience, as near as may be, of all such boats, vessels, crafts, or floats;" "to remove and prevent all obstructions in the waters which are public highways in said city, and to widen, straighten, and deepen the same;" and to "make wharves and slips at the end of streets, and alter, widen, contract, straighten, and discontinue the same." (*Id.*)

Under the authority of its charter and of the ordinance of June 14, 1852, the railroad company located its tracks within the corporate limits of the city. The tracks northward from Twelfth street were laid upon piling placed in the waters of the lake—the shore line, which was crooked, being at that time at Park Row, about 400 feet from the west line of Michigan avenue; at the foot of Monroe and Madison streets about 90 feet; and at Randolph street about 112½ feet. Since that time the space between the shore line and the tracks of the railroad company has been filled with earth by or under the direction of the city, and is now solid ground. After the construction of the track as just stated the railroad company erected a breakwater east of its roadway, upon a line parallel with the west line of Michigan avenue, and subsequently filled the space, or nearly all of it, between that breakwater and its tracks, and under its tracks, with earth and stone.

It is stated by counsel, and the record, we think, sufficiently shows, that when the road was located in 1852 nearly all of the lots bordering upon the lake *north of Randolph street* had become the property of individuals, by purchase from the United States, except a parcel adjacent to the river, which had not then been sold by the General Government. Soon thereafter the company acquired the title to all of the water lots in the Fort Dearborn addition north of Randolph street, including the remaining parcel belonging to the United States. The deed for the latter was made by the Secretary of War October 14, 1852, and included "all the accretions made, or to be made, by said lake and river in front of the land hereby conveyed, and all other rights and privileges appertaining to the United States as owners of said land." The company established its passenger house at the place designated in the ordinance of 1852, and, being the owner of said water lots north of Randolph street, it gradually pushed its works out into the shallow water of the lake to the exterior line specified in that ordinance, 1,376 feet east of the west line of Michigan avenue. In order that the railroad company might approach its passenger depot, the common council, by ordinance adopted September 10, 1855, granted it permission to curve its tracks westwardly of the line fixed by the ordinance of 1852, "so as to cross said line at a point not more than 200 feet south of Randolph street, extending and curving said tracks northwesterly as they approach the depot, and crossing the north line of Randolph street extended at a point not more than 100 feet west of the line fixed by the ordinance, in accordance with the map or plat thereof submitted by said company and placed on file for reference." This grant was, however, upon the following conditions: That the company lay out upon its own land, west of and alongside its passenger house, a street 50 feet wide, extending from Water street to Randolph street, and fill the same up its entire length within two years from the passage of said ordinance; that it should be restricted in the use of its tracts south of the north line of Randolph street, as provided in the ordinance of 1852; and "when the company shall fill up its said tracks south of the north line of that street, down to the point where said curves and side tracks commence, and the city shall grant its permission so to fill up its tracks, it should also fill up at the same time and to an equal height all the space between the track so filled up and the lake shore as it now exists, from the north side of Randolph street down to the point where said curves and side tracks intersect the line fixed by the ordinance aforesaid." The company's tracks were curved as permitted; the street referred to was opened, and has ever since been used by the public; and the required filling was done. It being necessary that the railroad company should have additional means of approaching and using its station grounds between Randolph street and the Chicago River, the city, by another ordinance adopted September 15, 1856, granted it permission "to enter and use in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the

space between its present [then] breakwater and a line drawn from a point on said breakwater 700 feet south of the north line of Randolph extended, and running thence on a straight line to the southeast corner of its present breakwater, thence to the river: *Provided, however*, and this permission is only given upon the express condition that the portion of said line which lies south of the north line of Randolph street extended shall be kept subject to all the conditions and restrictions, as to the use of the same as are imposed upon that part of said line by the said ordinance of June 14, 1852." In 1867 the company made a large slip just outside of the exterior line fixed by the ordinance of 1852, thereby extending its occupancy between Randolph street and Chicago River further to the east. Along the outer edge of this pier a continuous line of dock piling was placed, extending on a line from the river to the north line of Randolph street, 1,792 feet distant from the west line of Michigan avenue. This line formed the company's breakwater between the river and Randolph street at the time of the passage (April 16, 1869) of what is known as the "Lake-front act." In view of the important questions raised and of the rights asserted under that act it is here given in full:

An act in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that all right, title, and interest of the State of Illinois in and to so much of fractional section 15, township thirty-nine, range fourteen east of the third principal meridian, in the city of Chicago, county of Cook, and State of Illinois, as is situated east of Michigan avenue and north of Park row, and south of the south line of Monroe street, and west of a line running parallel with and four hundred feet east of the west line of said Michigan avenue, being a strip of land four hundred feet in width, including said avenue, along the shore of Lake Michigan, and partially submerged by the waters of said lake, are hereby granted in fee to the said city of Chicago, with full power and authority to sell and convey all of said tract east of said avenue, leaving said avenue ninety feet in width, in such manner and upon such terms as the common council of said city may by ordinance provide: *Provided*, That no sale or conveyance of said property, or any part thereof, shall be valid unless the same be approved by a vote of not less than three-fourths of all the aldermen elect.

SEC. 2. The proceeds of the sale of any and all of said lands shall be set aside, and shall constitute a fund, to be designated as the "Park Fund" of the said city of Chicago, and said fund shall be equitably distributed by the common council between the south division, the west division, and the north division of the said city, upon the basis of the assessed value of the taxable real estate of each of said divisions, and shall be applied to the purchase and improvement in each of said divisions, or in the vicinity thereof, of a public park or parks, and for no other purpose whatsoever.

SEC. 3. The right of the Illinois Central Railroad Company under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent of its gross earnings, and under and by virtue

of its appropriations, occupancy, use, and control, and the riparian ownership incident to such grant, appropriation, occupancy, use, and control, in and to the lands, submerged or otherwise, lying east of the said line, running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same; and that all gross receipts from use, profits, leases, or otherwise of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semiannually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor: and provided further, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now, or which may hereafter be, on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation.

SEC. 4. All the right and title of the State of Illinois in and to the lands, submerged or otherwise, lying north of the south line of Monroe street, and south of the south line of Randolph street, and between the east line of Michigan avenue and the track and roadway of the Illinois Central Railroad Company, and constituting parts of fractional sections ten and fifteen in said township thirty-nine, as aforesaid, are hereby granted in fee to the Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company, their successors and assigns, for the erection thereon of a passenger depot, and for such other purposes as the business of said company may require: provided, that upon all gross receipts of the Illinois Central Railroad Company, from leases of its interest in said grounds, or improvements thereon, or other uses of the same, the per centum provided for in the charter of said company shall forever be paid in conformity with the requirements of said charter.

SEC. 5. In consideration of the grant to the said Illinois Central, Chicago, Burlington and Quincy, and Michigan Central Railroad companies of this land as aforesaid, said companies are hereby required to pay to said city of Chicago the sum of eight hundred thousand dollars,

to be paid in the following manner, viz: Two hundred thousand dollars within three months from and after the passage of this act; two hundred thousand dollars within six months from and after the passage of this act; two hundred thousand dollars with in nine months from and after the passage of this act; two hundred thousand dollars within twelve months from and after the passage of this act, which said sums shall be placed in the park fund of the said city of Chicago, and shall be distributed in like manner as is hereinbefore provided for the distribution of the other funds which may be obtained by said city from the sale of the lands conveyed to it by this act.

SEC. 6. The common council of the said city of Chicago is hereby authorized and empowered to quitclaim and release to the said Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company any and all claim and interest in and upon any and all of said land north of the south line of Monroe street, as aforesaid, which the said city may have by virtue of any expenditures and improvements thereon or otherwise; and in case the said common council shall neglect or refuse thus to quitclaim and release to the said companies, as aforesaid, within four months from and after the passage of this act, then the said companies shall be discharged from all obligation to pay the balance remaining unpaid to said city.

SEC. 7. The grants to the Illinois Central Railroad Company contained in this act are hereby declared to be upon the express condition that said Illinois Central Railroad Company shall perpetually pay into the treasury of the State of Illinois the per centum on the gross or total proceeds, receipts, or income derived from said road and branches stipulated in its charter, and also the per centum on the gross receipts of said company reserved in this act.

SEC. 8. This act shall be a public act, and in force from and after its passage.

Passed, over veto, 16th April, 1869.

As early as May, 1869, the railroad company caused to be prepared a plan for an outer harbor at Chicago. On the 12th of July of the same year the Illinois Central Railroad Company, the Michigan Central Railroad Company, and the Chicago, Burlington and Quincy Railroad Company, by an agent, tendered to Walter Kimball, the comptroller of the city of Chicago, the sum of $200,000, as the first payment to the city under the fifth section of the act of 1869. He received the sum tendered upon the express condition that none of the city's rights be thereby waived, or its interest in any manner prejudiced, and placed the money in bank on special deposit, to await the action and direction of the common council. The matter being brought to the attention of that body, it adopted, June 13, 1870, a resolution declaring that the city "will not recognize the act of Walter Kimball in receiving said money as binding upon the city, and that the city will not receive any money from railroad companies under said act of the general assembly until forced to do so by the courts." The city never quitclaimed or released, nor offered to quitclaim or release, to said companies, or to either of them, any right, title, claim, or interest in or to any of the land described in the act of 1869, nor was Kimball's act in receiving the money ever recognized by

the city as binding upon it. On the expiration of his term of office, he did not turn the money over to his successor in office, but kept it deposited in bank to his own individual credit; and so kept it until some time during the year 1874, or later, when, upon application by the railroad companies, he returned it to them. No other money than the $200,000 delivered to Kimball was ever tendered by the railroad companies, or either of them, to the city or to any of its officers. At a meeting of the board of directors of the Illinois Central Railroad Company, held at the company's office in New York, July 6, 1870, a resolution was adopted to the effect "that this company accepts the grants under the act of the legislature at its last session, and that the president give notice thereof to the State, and that the company has commenced work upon the shore of the lake at Chicago under the grants referred to." On the 17th of November, 1870, its president communicated a copy of this resolution to the secretary of State of Illinois, and gave the notice therein required, adding: "You will please regard the above as an acceptance by this company of the above-mentioned law (lake front act), and it is desired by said company that said acceptance shall remain permanently on file and of record in your office." The secretary of state replied, under date of November 18, 1870: "Yours of the 17th instant, being a notice of the acceptance by the Illinois Central Railroad Company of the grants under an act of the legislature of Illinois, in force April 16, 1869, was this day received and filed, and duly recorded in the records of this office."

Following these transactions were certain proceedings, commenced about July 1, 1871, by information filed in this court by the United States against the Illinois Central Railroad Company. That information set forth that Congress, in order to promote the convenience and safety of vessels navigating Lake Michigan, had, from time to time, appropriated and expended large sums of money in and about the mouth of Chicago River, and had constructed two piers extending from the north and south banks of that river eastwardly for a considerable distance into the lake; that in July, 1870, it appropriated a large sum of money to construct an outer harbor at Chicago, in accordance with the plans of the engineer department of the United States; that the railroad company had, from time to time, wrongfully filled up with earth a portion of said lake within said harbor; that what the company had then done, in that way, and what it intended to do, unless prevented, would materially interfere with the execution of the plan of improvement adopted by the War Department. A temporary injunction was issued against the company. Subsequently, in 1872, the parties to that suit entered into a stipulation, from which it appears that the matters referred to in said information relating to the construction of docks and wharves in the basin or outer harbor of the city, formed by the breakwater then in process of erection by the United States, were referred to the War Department, and that the Secretary, upon the recommendation of engineer officers, approved cer-

tain lines limiting the construction of docks and wharves in said outer harbor, to wit: Commencing at the pier on the south side of the entrance to the Chicago River, 1,200 feet west of the Government breakwater; thence south to an intersection with the north line of Randolph street extended eastwardly; thence due west 800 feet; and thence south to the east and west breakwater proposed to be constructed by the United States, 4,000 feet south of the pier first above mentioned, the line so established being fixed as the line to which docks and wharves may be extended by parties entitled to construct them within said outer harbor. The railroad company desiring to proceed, under the supervision of the Engineer Bureau of the United States, with the construction of docks and wharves within the proposed outer harbor, between the pier on the south side of the entrance to Chicago River and the north line of Randolph street extended eastwardly, in conformity with the said limiting lines, and having agreed to observe said lines, as well as the directions which might be given in reference to the construction of said docks and wharves by the proper officers of said bureau, the injunctional order, pursuant to stipulation between the parties, was, January 16, 1872, vacated, and the information dismissed, with leave to the United States to reinstate the same upon the failure of the company, in good faith, to observe the said conditions. Subsequently the railroad company resumed work on, and during the year 1873 completed, pier No. 1, adjacent to the river, and east of the breakwater of 1869. On the 15th of April, 1873, the legislature of Illinois passed the following act, which was in force from and after July 1, 1873: "Section 1. *Be it enacted, etc.*, that the act entitled 'An act in relation to a portion of the submerged lands and Lake park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago,' in force April 16, 1869, be, and the same is hereby, repealed." In 1880 and 1881 piers Nos. 2 and 3, north of Randolph street, were constructed in conformity with plans submitted to and approved by the War Department. The common council of Chicago, by ordinance approved July 12, 1881, extended Randolph street eastwardly, and declared it to be a public street, from its then eastern terminus "to the west line of the right of way of the Illinois Central Railroad Company, as established by the ordinance of September 10, 1855, * * * and also straight eastwardly * * * from the easterly line of Slip C, produced southerly to Lake Michigan;" giving permission to the company to construct and maintain at its own expense, within the line of Randolph street so extended, and over the company's tracks and right of way, a bridge or viaduct, with suitable approaches, to be approved by the commissioners of public works, which should be forever free to the public, and to all persons having occasion to pass and repass thereon. Such a bridge or viaduct was necessary in order that the piers constructed, and in process of construction, east of the breakwater of 1869, might be conveniently reached by teams. The viaduct was built in 1881, and extends to the base of Pier 3. It has ever since

been used by the public. It appears from the evidence that, in 1882, the pier which was built in 1870 from Twelfth street to the north line extended of lot 21, was continued as far south as the center line of Sixteenth street. The main object of this extension, according to the showing made by the company, was to protect the tracks from the waves during storms from the northeast. Another object was to construct a slip or basin south of the south line of lot 21, between the breakwater and the shore, where vessels loaded with materials for the company, or having freight to be handled, could enter and be in safety. In 1885 a pier was constructed by the company at the foot of Thirteenth street, according to a plan submitted to the War Department; and the Department did not object to its construction, "provided no change be made in its location and length." The pier as constructed does not differ from that proposed and approved, except that it is wider by 50 feet. But it does not appear that the War Department regards that change in the plan as injurious to navigation, or as interfering with the plans of the Government for an outer harbor.

At the hearing a map was used for the purpose of showing the different works constructed by the United States; the location of all the structures and buildings erected by the railroad company, with the date of their erection; and the relation of the tracks and breakwaters of the company to the shore as it now is, and, to some extent, as it was heretofore. That map, known as the "Morehouse map" and called "C," is reproduced.

The State, in the original suit, asks a decree establishing and confirming her title to the bed of Lake Michigan, and her sole and exclusive right to develop the harbor of Chicago by the construction of docks, wharves, etc., as against the claim by the railroad company that it has an absolute title to said submerged lands, described in the act of 1869, and the right, subject to the paramount authority of the United States in respect to the regulation of commerce between the States, to fill the bed of the lake, for the purposes of its business, east of and adjoining the premises between the river and the north line of Randolph street, and also north of the south line of lot 21; and also the right, by constructing and maintaining wharves, docks, piers, etc., to improve the shore of the lake, for the purposes of its business, and for the promotion, generally, of commerce and navigation. The State, insisting that the company has, without right, erected, and proposes to continue to erect, wharves, piers, etc., upon the domain of the State, asks that such unlawful structures be directed to be removed and the company enjoined from constructing others. The city, by its cross bill, insists that since June 7, 1839, when the map of Fort Dearborn addition was recorded, it has had the control and use for public purposes of that part of section 10 which lies east of Michigan avenue and between Randolph street and fractional section 15; and that, as successor of the town of Chicago, it has had possession and control since June 13, 1836, when the map of

fractional section 15 addition was recorded, of the lands in that addition north of block 23. It asks a decree declaring that it is the owner in fee, and of the riparian rights thereunto appertaining, of all said lands, and has, under existing legislation, the exclusive right to develop the harbor of Chicago by the construction of docks, wharves, and levees, and to dispose of the same, by lease or otherwise, as authorized by law; and that the railroad company be enjoined from interfering with its said rights and ownership. The relief sought by the United States is a decree declaring the ultimate title and property in the "public ground" shown on the plat of the Fort Dearborn addition, south of Randolph street, and also in the open space shown on the plat of fractional section 15 addition, to be in the United States, with the right of supervision and control over the harbor and navigable waters aforesaid; that the railroad companies and the city be enjoined from exercising any right, power, or control over said grounds, or over the waters or shores of the lake; that the Illinois Central Railroad Company be restrained from making or constructing any piers, wharves, or docks, and from driving piles, building walls, or filling with earth or other materials in the said lake, or from using any made ground, or any piers, wharves, or other constructions made or built by or for it in or about the outer harbor, to the east of the 200-feet strip of its way-ground, or from taking or exacting any toll for such use; and that the Illinois Central Railroad Company be required to abate and remove all obstructions placed by it in said outer harbor and to quit possession of all lands, waters, and made ground taken and held by it without right as aforesaid. The State, the city, and the General Government all unite in contending that the lake-front act of 1869 is inoperative and void, for reasons that will be hereafter stated.

In disposing of the questions discussed by counsel it will be convenient to consider first those relating to the lands or grounds embraced in the Fort Dearborn addition to Chicago. It is apparent, from the facts stated, that whatever title the Illinois Central Railroad Company has to the water lots in that addition, between Randolph street and the Chicago River, is derived, as to some of them, directly, and, as to others, remotely, from the United States. It is, however, insisted, in behalf of the United States, that the subdivision and platting of Fort Dearborn reservation into blocks, lots, streets, and public grounds by Birchard was unauthorized by the act of 1819, under which alone he proceeded or could have proceeded. The point made is that upon the Secretary of War was conferred the power to dispose of military sites found to be useless, and that such power could not be delegated to or exercised by an agent, although especially appointed by him for that purpose. In this view the court does not concur. The direction in the act was that the Secretary "cause to be sold" such military sites as were useless—language implying that he might discharge the duty imposed by Congress through the agency of someone representing him. It certainly could not have been expected that he would visit Chicago and personally

superintend the sale. The plat shows upon its face, and the United States admit in their information, that Birchard acted in the premises for the Secretary of War, and only as his agent. It further appears that he acted under a power of attorney executed under the direction of the President

But it is contended that the power to cause these lands to be sold did not authorize the Secretary to dedicate a part of it to the public as streets and public grounds. And, in this connection, the district attorney maintains that the subdivision and platting by Birchard was not in conformity with the Illinois statute of February 27, 1833, for the recording of town plats. By the fifth section of that act the plat or map, when made out and certified, acknowledged, and recorded, as required by the statute, was to be deemed, as to every donation or grant to the public therein specified, a sufficient conveyance to vest in the city the fee simple of the lands so designated, and operated as a general warranty. It also declared that "the land intended to be for streets, alleys, ways, commons, or other public uses, in any town or city or addition thereto shall be held in the corporate name thereof, in trust to and for the uses and purposes set forth and expressed or intended." It is contended that the dedication of the streets and the public grounds south of Randolph street, on the lake shore, did not conform to the statute, and was at most a dedication at common law; in which event it is insisted, the fee to the streets and public grounds remains in the United States, notwithstanding the title must be held subject to the public uses by the platting and by the subsequent sales of lots with reference thereto. It seems to the court clear that the power given to the Secretary to sell—no particular mode for selling being prescribed—carried with it, by necessary implication, authority to adopt any mode that was not unreasonable, in view of the object to be accomplished, and that was customary in the case of lands within the limits of or near to a town or city. If a subdivision, in the mode ordinarily adopted in the locality, of a large tract, so situated, into blocks, lots, streets, and public grounds, was likely to be beneficial to the Government, it was the duty of the Secretary to adopt that mode of selling. If the subdivision and platting by Birchard was in conformity to the local statute in all material respects, then no conveyance by the United States of the legal title to the streets and public grounds was necessary. If it did not conform to the local law, and if the dedication of the streets and public grounds, shown on the map of Fort Dearborn addition, is to be deemed only valid as a dedication at common law, it would not follow that the United States can have a standing in court in respect to such streets and public grounds. The argument by the district attorney upon this point proceeds upon the ground that the General Government, after abandoning Fort Dearborn as a military site, and after having sold the whole of that reservation, except the parts reserved for streets and public grounds, had the capacity to hold the title to such streets and public grounds in trust for the public uses affixed to it. This position can not be maintained. The United

States took the right, title, and claim, as well of soil as of jurisdiction, which the Commonwealth of Virginia had in the Northwest Territory, for the purposes only of temporary government, and in trust for the performance of the stipulations and conditions imposed by the deed of cession. It was accepted as a common fund for the use and benefit of all the States, Virginia included. One of those conditions was that the territory so ceded should be laid out and formed into States, having the same rights of sovereignty, freedom, and independence as the other States. Consequently, when Illinois was admitted into the Union, "upon the same footing with the original States, in all respects whatever," she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Virginia possessed at the date of the cession, "except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession, and of the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State, except in the case in which it is expressly granted" (*Pollard's Lessee* v. *Hagan*, 3 How., 212, 223; *New Orleans* v. *United States*, 10 Pet., 662); or where it is necessary to the enjoyment of the powers conferred by the Constitution upon the General Government. (*Kohl* v. *United States*, 91 U. S., 367, 372; *United States* v. *Fox*, 94 U. S., 320; *United States* v. *Jones*, 109 U. S., 513, 519, 3 Sup. Ct. Rep., 346.) See, also, *Van Brocklin* v. *State of Tennessee*, 117 U. S., 151, 167, 168; 6 Sup. Ct. Rep., 670. When, therefore, Fort Dearborn reservation was subdivided into lots, and they were sold, with reference to the map or plat of such subdivision, and it was no longer used as a military site or for any purpose connected with the execution of the powers of the General Government, all the lands embraced within its limits ceased to be a part of the national domain. The title to the specific lots passed to those who purchased them, while jurisdiction over the streets and open grounds dedicated to public use passed from the United States; the title to and immediate possession and control of such streets and grounds vesting in the local government—that is, in the municipal corporation of Chicago—as a public agency of the State for the purposes for which such dedication was made. Touching the action of the Secretary of War and of his agent, Birchard, it may also be said that its validity was impliedly recognized in the case, already referred to, of *United States* v. *Chicago*. The question there was, as we have seen, whether the city had the right to open streets designated on the Birchard plat through that part of Fort Dearborn reservation which had not then been sold and was still used by the General Government as a military site. If the Birch-

ard subdivision was invalid, upon the ground that the Secretary could not invest him with power to do what he did, it would have been a ready answer, in that case, to the city's claim of authority to open Michigan avenue through Fort Dearborn reservation to the river, to say that Birchard's subdivision and platting, upon which the city relied, did not bind the United States. On the contrary, the decision proceeded upon the ground that the subdivision and platting was legal, although not done under the personal supervision of the Secretary of War; and that the right of the city to open Michigan avenue, as marked on the Birchard map, through that part of the reservation not then sold, would not come into existence until the occupancy of the United States ceased. Whatever doubt may remain upon this point is removed by the act passed by Congress August 1, 1854, for the relief of Jean Baptiste Beaubien, by which the Commissioner of the General Land Office was authorized to issue to him a patent or patents for certain specified "lots *as described and numbered on the survey and plat of the Fort Dearborn addition to Chicago, in the State of Illinois, made under the order of the Secretary of War, and now on file in the War Office.*" This statute is so far a recognition or ratification of the Birchard subdivision and of the acts of the Secretary of War as to preclude the United States and all others from making any question as to his power to make sale of Fort Dearborn reservation through the agency of Birchard, or as to the authority of the agent to subdivide these lands into blocks, lots, streets, and public grounds.

What has been said is sufficient to show that the United States have long since parted with all jurisdiction over or title to the lands embraced within that reservation, and that the Illinois Central Railroad Company, shortly after the location of its road within the corporate limits of Chicago, acquired a title in fee to all of the water lots on the lake shore within the Fort Dearborn addition *north of Randolph street.*

What rights did the railroad company have in virtue of such ownership? There can be no doubt that, upon her admission into the Union, the State of Illinois became the owner of and acquired jurisdiction over all the lands within her boundaries covered by the waters of Lake Michigan, subject only to such supervision and control of the use of such waters as might result from the exercise by Congress of its powers to regulate commerce with foreign nations and among the several States. (*Pollard's Lessee* v. *Hagan*, 3 How., 212; *Martin* v. *Wardell*, 16 Pet., 367; *Den* v. *Jersey Co.*, 15 How., 426; *Mumford* v. *Wardell*, 6 Wall., 436; *Weber* v. *Harbor Com'rs*, 18 Wall., 57; *County of St. Clair* v. *Livingston*, 23 Wall., 68; *Barney* v. *Keokuk*, 94 U. S., 339; *Van Brocklin* v. *State of Tennessee*, 117 U. S., 151, 167, 168; 6 Sup. Ct. Rep., 670.) Upon this ground both the State and the railroad company rest their respective claims. But it is insisted, and we think rightly, that, in the absence of any legislative or governmental direction as to the manner of the occupancy of the bed of the lake within the state, the railroad company, as the riparian owner of

the water lots north of Randolph street, had the right in virtue of such ownership, and as part of its purchase of such lots, to connect the shore-line by artificial constructions with outside waters that were navigable in fact; although the exercise of that right is at all times subject to such regulations—at least those not amounting to prohibition—as the State may establish. These principles find support in numerous cases. *Dutton* v. *Strong*, 1 Black, 24; *Railroad Co.* v. *Schurmier*, 7 Wall., 272; *Yates* v. *Milwaukee*, 10 Wall., 497; *Weber* v. *Harbor Commissioners*, 18 Wall., 57; *Atler* v. *Packet Co.*, 21 Wall., 389; *Delaplaine* v. *Railway Co.*, 42 Wis., 214; 1 Dill. Mun. Corp. §§ 70–77. In *Yates* v. *Milwaukee*, one of the questions was as to the rights of riparian owners of lots on Milwaukee River, near Lake Michigan, within the city of Milwaukee, with respect to wharves, piers, and other structures affecting the navigation of that river. The court said: "But, whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier, for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may see proper to interpose for the protection of the rights of the public, whatever those may be." Again: "This riparian right is property, and is valuable; and, though it must be enjoyed in due subjection to the rights of the public, it can not be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation." It is difficult to perceive any reason why these doctrines are not applicable to the Great Lakes of our country. It was in the exercise of these riparian rights, and with the consent of the city, that the railroad company, after the location of its road, and prior to 1867, pushed its works into the shallow water east of the shore line, north of Randolph street, until it reached the exterior line specified in the third section of the ordinance of 1852. Besides, the State—which, from the time of her admission into the Union, owned the bed of the lake thus occupied, and could lawfully permit it to be occupied for purposes not inconsistent with the public rights of navigation—had expressly authorized the railroad company to enter upon, take possession of, and use any lands, waters, or materials belonging to her for the location of its depots, station grounds, turn-outs, engine houses, shops, and other buildings that were necessary "for the construction, completing, altering, maintaining, preserving, and complete operation of said road," and that did not interrupt navigation. It is true that this power, in respect to lands, waters, and materials belonging to the State, within the corporate limits of a city, could not have been exerted by the company, under its charter, unless such city, by its common council, consented to the location of the road within its limits. But when such consent was given by the city of Chicago, upon the con-

ditions specified in the ordinance of 1852—conditions which it could lawfully impose—the right of the railroad company, so far as the State and city were concerned, to fill in the lake, to the extent prescribed by that ordinance, and to use the ground thereby made, was placed beyond question. As to the structures erected by the company east of the exterior line designated by the ordinance of 1852, those built in 1867 may be justified—apart from the confirmatory clauses of the act of 1869—under the power expressly given to enter upon, take possession of, and use (provided navigation was not thereby interrupted) any lands or waters of the State that were necessary for the complete operation of the road, for the purpose designated in the charter of the company. And as to the improvements made and structures built in 1873, 1880, 1881, north of Randolph street, they may be justified upon the same ground; and upon the further ground that they were recognized and permitted, if not directly approved, by the proper authorities of the United States, charged with the duty, by acts of Congress, of establishing an outer harbor of the city. So far as the United States are concerned, the court can not regard these structures, or any of them, as interfering in any degree with the plans adopted, or in contemplation, by the General Government in reference to the harbor of Chicago. (*Wisconsin* v. *Duluth*, 96 U. S., 379; *South Carolina* v. *Georgia*, 93 U. S., 4.) We would not be understood as saying that the State is concluded by the mere failure of the proper officers of the United States, at the time, to forbid the erection of these structures by the company. Nor does the court intend to question the power of the State, by legislation, to prescribe the lines beyond which piers, docks, wharves, and other structures—other than those erected under the authority, express or implied, of the General Government—may not be built, by riparian owners, in the waters of the harbor that are navigable in fact. All that we intend now to decide is that, under the showing made, no basis exists for a decree declaring to be illegal the structures heretofore erected by the company east of the exterior line fixed by the ordinance of 1852; such structures appearing, under the evidence, to have been required by the growing business of the company, and therefore necessary for the "complete operation of the road;" and it not appearing that such use of the waters of the lake interrupts navigation, or materially obstructs the use of the harbor by those engaged in commerce, or interferes with the plans devised by the United States for the improvement of that harbor. Whether a structure interrupts navigation—that is, interferes with the public rights of navigation—must depend upon the circumstances of each case. A structure might interrupt the navigation of a river, while one of like character erected in a great lake would not, in any just sense, impair the public right of navigation.

In respect to the company's right of way from Randolph street to the north line of block 23, the triangular pieces of ground south of Randolph street, and the structures erected by the company south of Park row, but

little need be said, in view of the conclusions already announced by the court. The right of way was located in the open waters of the lake. The State consented, in the charter of the company, that the bed of the lake might be used by the company for a right of way, provided the city assented to the location of the tracks within its limits. The city gave its consent by the ordinance of 1852. Nothing more is requisite to show that the tracks of the company were legally located on the line designated for a right of way. The use of such ground, in perpetuity, as a right of way simply, does not violate any right of the State, of the city, or of the United States. Upon the same grounds—the power given to the company in its charter to enter upon and use any land or waters belonging to the State for a right of way of a prescribed width, and for the location of depots, and for the purpose of constructing station grounds, turnouts, buildings, etc., necessary to the complete operation of its road, and the consent of the city, as manifested in the ordinances of 1855 and 1856—the occupancy of the two triangular pieces of ground south of Randolph street for the purposes of right of way must be sustained as legal. It would be waste of time to set out the evidence showing that these two pieces of ground are essential to the operation of the road. Without them, as the ordinances of 1855 and 1856 upon their face indicate, the trains of the company could not conveniently approach its passenger depot, freight yards, and piers.

What has been said upon this branch of the case is decisive of the question before the court in respect to the structures erected by the railroad company south of Park row and north of Sixteenth street. The company is shown to be the owner of all the water lots in front of which such structures have been made. The breakwater there constructed was, according to the evidence, necessary to protect the railroad from the waters of the lake; the old breakwater having become insufficient, under the ordinance of 1852, which, it must be remembered, required the shore to be protected by a continuous stone wall or structure of stone masonry, pier work, or other material, outside of the track of the road, as might be "expedient," and as would be of the strength and magnitude requisite to protect the entire front of the city between the north line of Randolph street and its southern boundary against further damage from the action of the waters of the lake. The part of the structure to be erected south of Lake Park was required by the ordinance to be commenced and prosecuted with all reasonable dispatch after the acceptance of the ordinance. While the new breakwater is further from the shore than the old one, it does not appear to materially obstruct the use of the navigable waters by the public. As to the large pier at the foot of Thirteenth street, it does not interfere with the public right of navigation. It is wider than was contemplated by the company at the time the plan therefor was submitted to the War Department. But such increase of width does not seem to be a matter of any consequence. According to the evidence, none of the structures

south of Park row interfere with the public use of the waters of the lake for purposes of commerce and navigation. Their erection may fairly be referred to the riparian ownership of the company and to its charter right to occupy and use the land and waters of the State for the purposes defined in its charter, provided, only, navigation is not interrupted; and, as their erection was not forbidden by regulations established under the authority of any statute, no ground is shown for the interference of the court. Whether the railroad company, in its erection of wharves, docks, piers, and other structures, has not gone as far as it may go without interrupting the navigation of the lake, or whether it could lawfully erect other structures on the lake without authority from the legislature of the State, are questions which the court is not now required to determine.

The questions next to be examined relate to the subdivision, in 1836, of fractional section 15 by the canal commissioners. We have seen that the canal commissioners had express legislative authority to make the subdivision, and to sell and convey the lots embraced in it. It was made in conformity, in all material respects, with the Illinois statute of 1833. That is substantially conceded on all hands. As the plat or map of the subdivision was made out, certified, acknowledged, and recorded as required by that act, the fee simple to the streets, alleys, ways, commons, or other public grounds vested by force of the statute, and without a formal conveyance, in the town of Chicago, in trust for the public uses affixed to them. (Section 5; *Canal Trustees* v. *Havens*, 11 Ill., 556; *Gebhart* v. *Reeves*, 75 Ill., 304; *City of Chicago* v. *Rumsey*, 87 Ill., 354; *Zinc Co.* v. *City of La Salle*, 117 Ill., 411 8 N. E. Rep., 81.) And to the estate, real and personal, vested in, or belonging to, or held in trust by, the trustees of the town, the city of Chicago succeeded, under the act of March 4, 1837. So that, when the lake front act of 1869 was passed, the fee was in the city of Chicago, subject to the public uses indicated, of all the then open ground south of the middle line of Madison street and north of Park row, and east of the west line of Michigan avenue. And so, also, is the fee in the city of the made or reclaimed ground between Randolph street and Park row, including the ground upon which rest the tracks and the breakwater constructed by the railroad company south of Randolph street. The grant to the city of power to establish "wharves and slips at the ends of the streets," was in aid of commerce and navigation, and was, by necessary implication, a grant of the lands upon which such wharves and slips might be established; such grant taking effect when structures of that kind were erected. (*Williams* v. *Mayor, etc.*, 11 N. E. Rep., 829.) And it necessarily implied authority to fill in the lake, for the purpose of such improvements, at least to the point of navigability. If the city had, before the passage of the ordinance of 1852, exerted the power thus conferred, it certainly would have become the owner of all the ground so reclaimed, for the purposes of wharves and slips, at the ends of streets. But the city also had the right, as riparian owner—its ownership of the

open ground east of Michigan avenue extending to the line of the water as it usually stood when free from disturbing causes (*Seaman* v. *Smith*, 24 Ill., 524)—to fill in the lake and erect walls to the extent necessary to protect its own and the property of its people from the violence of the waters of the lake; certainly, if it did not thereby interfere with the public rights of navigation. But, if that were not so, the city was expressly given power, by its charter, to erect a breakwater or barrier for protection against encroachment by the waters of the lake. If it had itself erected a breakwater, south of Randolph street, in front of fractional sections 10 and 15, on the precise line adopted by the railroad company under the ordinance of 1852, and filled in the space between the breakwater and the shore line, it could not be doubted that it would have become the owner of all the ground thus reclaimed and occupied. But, instead of doing that work itself, the city employed the railroad company to do it, in consideration of the grant to that company of the privilege of entering the city, and of laying its tracks in front of Lake Park grounds and of the open grounds south of Randolph street. When the railroad company established its breakwater, as it agreed with the city to do, and filled in the space set apart for the right of way, and when the space between the shore-line and the company's right of way was filled in by the city, we can not see but that the latter, as the riparian owner of the land upon the shore-line as it was before any of the filling was done, became also, with the consent of the State, the owner of the fee of all such reclaimed ground, including that occupied by the railroad tracks and the breakwater; such ownership being, however, subject to the use by the railroad company, according to the terms prescribed by the ordinance of 1852, in perpetuity, as a right of way, of the ground upon which its tracks were laid.

This brings us to the consideration of numerous questions arising out of the lake-front act of 1869. If that act contained no other provisions than those relating to the express grant to the Illinois Central Railroad Company of the submerged lands described in section 3, the first and principal question to be determined would be as to the validity of the repealing act of 1873. But, as will be seen, the former act did something more than grant the right and title of the State in the submerged lands constituting the bed of the lake within certain limits. It confirmed, by the third section, certain rights which the railroad company had previously acquired in other lands. As, in our judgment, the repeal of 1873, for reasons to be hereafter stated, did not abrogate all the provisions of the act of 1869, and as the opinion of the court seems to be desired upon all the points raised as to the latter act, we must first consider whether it be true, as asserted, that the act of 1869 was inoperative for every purpose and as to all of its provisions. Indeed it would, in our judgment, be premature, if not unseemly, to consider what was the scope or effect of the act of 1869, or inquire as to the validity of the act of 1873, without first examining the grounds upon which it is con-

tended that the act of 1869 never became, as to any of its provisions, a law of the State.

The constitution of that State, adopted in 1848 and in force in 1869, contained these provisions: "Each house shall keep a journal of its proceedings. The yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journals." (Art. 3, § 13.) "Bills may originate in either house, but may be altered, amended, or rejected by the other; and on the final passage of all bills the vote shall be by yeas and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members in each house" (*Id.*, § 21.) "Every bill shall be read on three different days in each house, unless, in case of urgency, three-fourths of the house where such bill is so depending shall deem it expedient to dispense with this rule; and every bill, having passed both houses, shall be signed by the speakers of their respective houses; and no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." (*Id.*, § 23.) It is contended that the general assembly, in passing the lake-front act, did not meet these requirements, and consequently that the act never became a law. The claim is that the bill was not read on three different days in each house, and that its subject is not expresed in the title. The facts upon which this claim rests will now be stated.

On the 13th of January, 1869, a bill was introduced into the house entitled "An act to enable the city of Chicago to enlarge its harbor, and to grant and to cede all the rights, title, and interest of the State in and to certain lands of the State lying on and adjacent to the shore of Lake Michigan on the eastern frontage of said city." This bill expresses a desire that the harbor be enlarged and commerce and navigation on the lake promoted by the construction of docks, piers, breakwaters, and other works, according to such plans as might be made by the Secretary of War. To that end it granted and ceded to the city all the right, title, and interest of the State in and to the submerged lands constituting the bottom of Lake Michigan, lying on the eastern front of the city, for the space of one league eastwardly from the shore-line; such grant and cession being upon the express condition that the city should not, on any account, alien, sell, or convey the said lands, but hold them in trust forever for the uses and purposes above stated; with the privilege, however, of leasing the same for a period not exceeding ninety-nine years at any one time, upon the same terms as the school lands belonging to the city. The bill also granted and ceded to the city all the right, title, and interest of the State in and to the lands and grounds between the east line of Michigan avenue and the track of the Illinois Central Railroad, whether the same be submerged or not, constituting a part of sections 10 and 15, in township 39, range 14 E. of the third principal meridian, or lying or being adjacent thereto on the east. This grant was subject to various conditions,

among which were that the premises should not be conveyed or leased except upon the votes of three-fourths of the aldermen required to be elected, and that the city, at its election, might dedicate the whole or part of the premises for a public park. On the day of its introduction this bill was read a first time, and ordered to be read a second time. The same day "the rule was dispensed with," the bill read a second time and referred to a committee. On the 4th of February, 1869, the committee reported it back with amendments, recommending its passage as amended. The house adopted other amendments; and on the 10th of February, 1869, the report, as amended by the house, was adopted. On the same day the bill was ordered to be engrossed for a third reading. It was read a third time on the 20th of February and passed. On the same day, immediately after its passage, it was ordered by the house that the title be "A bill for 'An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago.'" The fact of the passage of the bill in the house was communicated to the senate on the day of its passage, and two days thereafter it was taken up, read a first time, "ordered to a second reading," and laid on the table to be printed. On the 1st of March, 1869, the committee to which the bill had been previously referred reported it back with a recommendation in favor of its passage. The report "was concurred in, and the bill ordered to a third reading." The bill was read a third time and passed, with the foregoing title, on the 8th of March, 1869. It was vetoed by the governor, and on the 16th of April, 1869, passed each body, his objections to the contrary notwithstanding. It will be seen from this history of the act as it went through the legislature that nothing appears in the senate journal to show that the bill was in fact read a second time in that body. Is it essential to its validity that it should appear in the journal that the bill was "read on three different days in each house?" Does the mere silence of the senate journal as to whether the bill was in fact read a second time in that body, on some one of three different days, raise a conclusive presumption that it was not so read?

The earliest case in the supreme court of Illinois upon this general subject to which our attention has been called is *Spangler* v. *Jacoby* (14 Ill., 297). The court there said: "In our opinion, it is clearly competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation. The constitution requires each house to keep a journal, and declared that certain facts made essential to the passage of a law shall be stated therein. If those facts are not set forth the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house and is presumed to contain a full and complete history of its proceedings. If a certain act receive the constitutional assent of the body, it will so appear on the face of the journal, and, when a contest arises as to whether an act was thus passed,

the journal may be appealed to to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the constitution that the signatures of the speakers and executive should furnish conclusive evidence of the passage of a law. The presumption, indeed, is that an act thus verified became a law pursuant to the requirements of the constitution; but that presumption may be overthrown. If the journal is lost or destroyed this presumption will sustain the law, for it will be contended that the proper entry was made in the journal; but when the journal is in existence and it fails to show that the act was passed in the mode prescribed by the constitution, the presumption is overcome and the act must fall." This decision is cited by counsel to support the proposition that the mere silence of the journal as to whether a bill was or not read on three different days—the journal not being lost or destroyed—is itself fatal to the validity of the act. But we are not satisfied that the court intended to express an opinion upon that precise point. Although it did not appear, in that case, that the bill was read the third time before it went to the senate, or that the ayes and noes were called, no special comment was made by the court upon the silence of the journal as to the bill not being read the third time. Plainly, its language had reference to the fact that the journal did not show the passage of the bill by ayes and noes. It was with reference to that fact that the language above quoted was used. In *Turley* v. *County of Logan* (17 Ill., 152) the court said that "the journals should show the readings and the passage of the law by a constitutional vote;" but nothing was said as to what would be the result where the journal did not show that each of the required readings was had. The general language above quoted seems to have been unnecessary to the decision, for the court finally sustained the validity of the act there in question, upon the ground that the same legislature, in extra session, caused its journals to be amended so as to show what, according to the minutes of the clerk of the house, was the fact—that the bill had been read the required number of times. That we do not misinterpret these decisions is shown in *Supervisors of Schuyler Co.* v. *People* (25 Ill., 181), where one of the grounds of objection to an act was that the senate journal did not show that the bill was read three times before it was put on its final passage. The court said: "The constitution does require that every bill shall be read three times in each branch of the general assembly before it shall be passed into a law; but the constitution does not say that these several readings *shall be entered on the journals*. Some acts performed in the passage of laws are required by the constitution to be entered on the journals in order to make them valid, and among these are the entries of the ayes and nays on the final passage of every bill; and we held in the case of *Spangler* v. *Jacoby* (14 Ill., 297) that, where the journal did not show *this*, the act never became a law. But where the constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left

to the discretion of either house to enter it or not; and *the silence of the journal on the subject ought not to be held to afford evidence that the act was not done.* In such a case we must presume it was done, unless the journal affirmatively shows that it was not done." This decision was expressly reaffirmed in *Railroad Co.* v. *Hughes* (38 Ill., 186). Nothing to the contrary was decided in *People* v. *Starne* (35 Ill., 141) or in *Ryan* v. *Lynch* (68 Ill., 161), which is relied upon as modifying or overruling *Supervisors of Schuyler Co.* v. *People.* The case in 35 Ill. recognizes the doctrine of the *Schuyler Co. Case*, and goes upon the ground that the ayes and noes were not called and spread upon the journals of the house on the passage of the bill. In *Ryan* v. *Lynch* it appeared from the journal that the bill was read twice in the senate; but the journal was silent as to a third reading, and did not show any call of the ayes and noes on the final passage of the bill. The decision was that as the proceedings in the senate, certified by the secretary of state, were competent proof of the facts therein stated, the failure of the journal to show a call of the ayes and noes was fatal to the bill. Nothing was said as to the effect to be given to the mere silence of the senate journal as to the third reading of the bill. Indeed, we do not find that any of the numerous decisions of the State court relating to the passage of bills by the legislature have modified or overruled the doctrine announced in *Supervisors of Schuyler Co.*, v. *People.* With that doctrine we are entirely satisfied. It is in harmony with the adjudications in many of the States whose constitutions have provisions similar to those in the constitution of Illinois which we have been considering. (*Miller* v. *State*, 3 Ohio St., 475; *McCulloch* v. *State*, 11 Ind., 424; *State* v. *City of Hastings*, 24 Minn., 78; *English* v. *Oliver*, 28 Ark., 317; *Chicot Co.* v. *Davies*, 40 Ark., 200; *State* v. *Francis*, 26 Kans., 724; *In re Vanderberg*, 28 Kans., 243; *State* v. *Mead*, 71 Mo., 268.) We therefore hold that the mere silence of the senate journal as to whether the act of 1869 was read the second time in that body does not justify us in holding it to be invalid.

The next inquiry under this head is whether the act of 1869 is a private or local law; if so, whether the title sufficiently expresses the subject thereof. In entering upon this inquiry we lay out of view the eighth section of the act declaring it to be a public act; for the mere declaration of the legislature that it was a public act would not make it such or preclude the determination of its character by the courts. (*Railroad Co.* v. *Gregory*, 15 Ill., 28.) On behalf of the railroad company it is contended that the word "private" is used as contradistinguished from "public," and "local" as contradistinguished from "general;" that the act in question is both public and general, because it concerns the interests of the public at large, contains a grant of the public domain of the State, provides for a revenue to be applied for State purposes only, and has in view the improvement of a harbor, in which object as well the people of Chicago as of the entire country and of foreign countries

are interested. We recognize the force of this argument. But, if it be sound it would follow that every act, or at least the great body of acts, referring in any way to municipal corporations, and to railroads constructed and maintained under legislative authority must be taken out of the prohibition against the passage of a private or local law whose subject is not expressed by its title; for all such acts may be said to relate to agencies employed by the State for the accomplishment of public purposes, and in which, in some sense, the people of the whole State are interested. Some light, we think, is thrown upon this question by the constitution of 1870, which does not contain any provision requiring the subject of a private or local law to be expressed in its title, but instead thereof prohibits the general assembly from passing "local or special laws" in certain enumerated cases, among which are laying out, opening, altering, and working roads or highways; vacating roads, town plats, streets, alleys, and public grounds; locating or changing county seats; regulating county and township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables; providing for changes of venue in civil and criminal cases; incorporating cities, towns, or villages; providing for the management of common schools; the protection of game or fish, and chartering or licensing ferries or toll bridges. The word "local," as used in the constitution of 1870, evidently means what it did in that of 1848; and we are of opinion that laws relating to any of these subjects would have been deemed "local," within the meaning of the constitution of 1848, when, by their terms, they were to have only a local territorial operation. In many of the States the constitutional requirement is that every law, whether private or public, local or general, shall contain but one subject, which shall be expressed in the title. But the Illinois constitution of 1848 had in view only to guard against enactments of a private or local character, the subject whereof was not expressed in the title. If it were conceded, in this case, that the act of 1869 must, by reason of some of its provisions, be deemed a public act, within the rule requiring courts to take judicial notice of its contents (*Binkert* v. *Jansen*, 94 Ill., 290), the result would not follow for which counsel of the company contend; for the constitutional prohibition equally applies to legislation which is local in its character. In other words, an act may be of a public nature, and yet, by its terms, be local in its operation and immediate results. This act does not relate to the entire line of the railroad company within the State nor to all the municipal corporations existing under her authority, but, among other things, to specified property in a particular city. It contains provisions which concerned the people within that municipality far more than the people of any other locality in the State. Obviously the intention of the framers of the constitution was to protect local communities against enactments of the subjects whereof they had no previous notice from the titles used by the promoters of such

legislation. An act is local which specially concerns the property and rights of a portion of the people of the State, although its subject may be of a public nature, and although in its general operation the people of the entire State may, in some sense, have an interest. It is none the less a local act within the meaning of the constitution because some of its provisions, if embodied in a separate statute, might have made that statute a general law. As we shall see further along, the city of Chicago had, when the act of 1869 was passed, certain property rights in lands within its corporate limits. In that property no other municipal corporation of the State had any direct interest. Of some of that property the act required the city to make sale to particular corporations at a named price. If such an act be not local it is difficult to conceive of one that would be of that character within the meaning of the constitution.

The rules to guide us in solving the question whether the subject of an act is sufficiently expressed seem to be well established by numerous decisions of the supreme court of Illinois. In *Railroad Co.* v. *Gregory* (15 Ill., 20) it was said that the provision of the constitution must receive "a fair and reasonable construction—one which will repress the evil designed to be guarded against, but which at the same time will not render it oppressive or impracticable." In *City of Ottawa* v. *People* (48 (Ill., 233) that, while the subject must be expressed, "the adjuncts to that subject, or the *modus operandi*, need not be." In *Binz* v. *Weber* (81 Ill., 288) that the question whether an act contains more than one subject is to be determined by the controlling purpose of the law, not by the various provisions made for carrying that purpose into effect. In *Johnson* v. *People* (83 Ill., 431) that the constitution "does not require that the subject of the bill must be specifically and exactly expressed in the bill; hence we conclude that any expression in the title which calls attention to the subject of a bill, although in general terms, is all that is required." In *Blake* v. *People*, 109 Ill., 504, that the clause of the constitution under consideration has uniformly been "construed liberally in favor of the validity of enactments; and the fact that many things of a diverse nature are authorized or required to be done is unimportant, providing the doing of them may fairly be regarded as in furtherance of the general subject of the enactment." And in *Mix* v. *Railroad Co.*, 116 Ill., 502, 6 N. E. Rep., 42, that "it is sufficient that the act is fairly covered by its title. The constitution does not require that all the legal effects of an act, such as repeals by implication, should be expressly stated in the title. Such a thing would be utterly impracticable. The general rule is illustrated in numerous cases in the State court, to some of which it will be well to refer. In *Railroad Co.* v. *Gregory*, 15 Ill., 20, "An act to incorporate the Belleville and Illinoistown Railroad Company" was held to contain but one subject, although one of its provisions conferred upon a named city and county authority to subscribe to the stock of the company, and although another section authorized the company to unite

with any other railroad then or thereafter to be constructed in the State. So was "An act to incorporate the Firemen's Benevolent Association, and for other purposes," which contained a provision requiring the agents of all foreign insurance companies doing business in Chicago to pay to the association 2 per cent on the amount of all premiums received by such agents. *Association* v. *Lounsbury*, 21 Ill., 511. In *O'Leary* v. *County of Cook*, 28 Ill., 534, "An act to amend an act entitled 'An act to incorporate the Northwestern University,'" which contained a prohibition upon the sale of ardent spirits within a distance of four miles of the university, was sustained; the court observing that "it is not the purpose of the constitution to deprive the legislature of any power necessary to enable them to make private legislation ample and abundant to accomplish its legitimate purpose, but the object was to prevent them from covertly embracing several distinct and foreign subjects in one act." In *Neifing* v. *Town of Pontiac*, 56 Ill., 172, "An act to extend the corporate powers of the town of Pontiac" was sustained, as embracing one subject, although it contained provisions both extending and restricting such corporate powers. "An act to amend the charter of the city of Chicago" was held, in *Prescott* v. *City of Chicago*, 60 Ill., 121, to sufficiently cover, by its title, provisions extending the limits of the city, and providing for the improvement and regulation of certain parks. In *People* v. *Hydraulic Co.*, 115 Ill., 281, 3 N. E. Rep., 413, an act passed in 1853 was sustained as embracing one subject; the title being "An act to amend an act incorporating the Hydraulic Company and the Lasalle County Manufacturing Company of Ottawa, both incorporated under the general law approved February 10, 1849." The court said: "The subject of the act of 1853, therefore, was the amendment of the act of 1849, or of the act incorporating these two companies; and the additional powers conferred on the two companies were clearly germane to the amendment of the charter. It can hardly be that this objection is founded on the fact that the legislature has, by a single act, conferred certain powers and privileges on two distinct corporate bodies. It would be just as reasonable to say that the legislature, by reason of the constitutional provision in question, could not make a joint grant to two separate persons; and no one, we presume, would contend that for a moment." The decisions of the Supreme Court of the United States, interpreting the constitution of Illinois, and construing the constitutions of other States having provisions similar to those found in the constitution of Illinois of 1848, are to the same effect. (*Woodson* v. *Murdock*, 22 Wall., 351, 373; *San Antonio* v. *Mehaffy*, 96 U. S., 315; *Unity* v. *Burrage*, 103 U. S., 447; *Louisiana* v. *Pilsbury*, 105 U. S., 278, 289; *Montclair* v. *Ramsdell*, 107 U. S., 147, 153, 155, 2 Sup. Ct. Rep., 391; *Jonesboro City* v. *Railroad Co.*, 110 U. S., 192, 199, 200, 4 Sup. Ct. Rep., 67; *Otoe Co.* v. *Baldwin*, 111 U. S., 1, 4 Sup. Ct. Rep., 265; *School Dist.* v. *Hall*, 113 U. S., 135, 5 Sup. Ct. Rep., 371; *Mahomet* v. *Quackenbush*, 117 U. S., 508, 6 Sup. Ct. Rep., 858; *Carter Co.* v. *Sinton*, 120 U. S., 517, 7 Sup. Ct. Rep., 650.)

Applying these principles to the act of 1869, we are satisfied that it embraces one subject only, namely, the disposal of lands or grounds lying on and adjacent to the shore of Lake Michigan on the east front of the city of Chicago. Every clause and section of the act relate to that general subject. The title gives notice that the act relates to that subject, and therefore was information to all that the act was to deal with it. What disposition was to be made of the lands and grounds referred to in the title appears from the body of the act.

It is insisted, however, that the effect of the act is, by implication, to enlarge the corporate powers of the Illinois Central Railroad Company, by permitting it to become, for all practical purposes, a wharf or dock company. If this be true, as we think it is, it does not follow that the title fails to express the subject of the act. Whether the submerged lands and Lake Park grounds were to be held, owned, or managed by individuals, or by some municipal or railroad corporation, are matters of detail, which, according to the decisions of the State court, the legislature was not required to express in the title. It was only required to express the subject to which the act related. So far, then, as the act deals with the subject expressed in the title it is capable of being enforced without violating the constitutional provision under consideration.

Some doubt arose, on the argument, as to whether the first part of section 3 and sections 4, 5, and 6 did not embrace subjects that were unexpressed in the title. The title refers "to submerged lands and Lake Park grounds." The railroad company in 1869 occupied, used, and controlled grounds north of Randolph street, which never constituted part of Lake Park grounds, nor were they at that time submerged lands. And the same observation may be made as to the "public grounds" on the shore, east of Michigan avenue, and between Madison and Randolph streets. Hence it was argued that the above sections embraced subjects —that is, lands not submerged, nor part of Lake Park grounds—which are unexpressed in the title. On the other hand, it may be fairly, and we think properly, contended that the general subject, expressed in the title, is lands or grounds "lying on and adjacent to the shore of the lake, on the eastern frontage of the city of Chicago;" that all the lands or grounds described in the body of the act, whether submerged or not, are covered by that description; that the legislature, in referring to submerged lands, may have intended to describe them as they were when fractional sections 10 and 15 were subdivided and platted; and that to limit the general description by a literal interpretation of the words "submerged lands and Lake Park grounds" is inconsistent with the liberal construction which the supreme court of the State has always given to the constitutional provision in question. What was said by the supreme court of the United States in *Montclair* v. *Ramsdell*, 107 U. S., 147, 2 Sup. Ct. Rep., 391, may be here repeated, namely: That the objection should be grave, and the conflict between the statute and the constitution pal-

pable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by the title."

It is also contended that no act could, under the constitution, become a law, unless it bore, during the whole period of its pendency in and passage through *each* branch of the legislature, an appropriate title; that is, a title which sufficiently expressed the subject of the act. It will be remembered that the bill, when first introduced, bore the title of "An act to enable the city of Chicago to enlarge its harbor, and to grant and to cede all the rights, title, and interest of the State in and to certain lands lying on and adjacent to the shore of Lake Michigan on the eastern frontage of said city." According to the house journal, the bill, after the second reading, was referred to a committee, which subsequently reported it back with an amendment which, in effect, was a substitute for the senate bill, except the title. The substitute was adopted. The bill as amended was read a third time, and passed; the present title being adopted *after the passage* of the bill in the house. If we do not misunderstand the point here made, it is that even if the present title sufficiently expressed the subject of the bill, *as it finally passed both branches of the legislature*, the title which the bill had at the time of its several readings in and passage *by the house* did not express the subject of the act as it finally passed over the veto of the governor. In support of this proposition, we are referred to *Binz* v. *Weber*, 81 Ill., 288, in which the court said that, by giving effect to the constitutional provision under examination, "no portion of a bill not germane to its general object, or not expressed in its general title when passed through the two houses, can acquire the force of a law. Only the portions of a bill expressed in the title when passed are constitutionally adopted. This being so, it does not matter what title might be adopted after its passage to designate a law. The title adopted after the passage of a bill is no part of the law, nor does it enlarge, limit, or control the law. The title to a bill is an essential part of a bill, and under the constitution every bill must have a title, and such title must truly state the object of the bill. Under this constitutional requirement, then, we must look to the title of this bill as it passed each house, and not to the title of the act after its adoption, to learn what portion of its provisions are constitutional. By thus applying these provisions to the passage of a law, we have no doubt we shall effectuate the intention of the framers of that instrument." In *Johnson* v. *People*, 83 Ill., 431, the court said: "In the case of *Binz* v. *Weber*, 81 Ill., in passing upon a similar provision of the constitution of 1848 applicable to private laws, we said that the validity of an act must depend, under such a provision, upon the title of the bill as it passed both houses, and not on the title of the law after its adoption. Is, then, the title by which the bill passed sufficient to sustain the law?" Having already determined that the present title of the act—which was the title before the bill was sent from the house, as well as when it passed the

senate—sufficiently expressed the subject thereof, it is only necessary, under the decision of the State court, to inquire whether the subject of the act was sufficiently expressed by this title at the time it passed the house. That there is some difference between the original and substituted title must be conceded. But that difference is not so marked as to justify the court in sustaining the point under examination. The general subject of each title is "certain lands lying on and adjacent to the shore of Lake Michigan on the eastern frontage of the city of Chicago." The original title suggested the enlargment by the city of its harbor, and the cession of the rights, title, and interest of the State in the lands referred to. But to whom such cession was to be made was not distinctly indicated. The idea conveyed was that the lands described were to be used so as to enable the city to enlarge its harbor. Turning to the body of the act as it passed the house, we find that the lands therein disposed of are lands embraced within the description in the original title; the rights, title, and interest of the State therein being granted and ceded. The only part of the original title which does not express anything to be found in the act are the words "to enable the city of Chicago to enlarge its harbor." But that difference is immaterial, for everything in the act is sufficiently expressed in the remainder of the title as it passed the house before the present title was substituted; that is, by the words "to grant and to cede all the rights, title, and interest of the State in and to certain lands lying on and adjacent to the shore of Lake Michigan on the eastern frontage of said city." Had these words constituted the title of the act as finally passed, we do not doubt it would have met the requirements of the constitution. If this be so, the act did not fail to become a law merely because the original title contained superfluous words.

Another objection to the act of 1869, based upon the local law, rests upon sections 1 and 2 of article 11 of the constitution of Illinois, adopted in 1870, which provide:

SECTION 1. No corporation shall be created by special laws, or its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the State; but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.

SEC. 2. All existing charters or grants of special or exclusive privileges under which organization shall not have taken place, or which shall not have been in operation within ten days from the time this constitution takes effect, shall thereafter have no validity or effect whatever.

These sections of the constitution took effect August 8, 1870. It is contended that neither at that time, nor within ten days thereafter, was there a valid or binding acceptance by the railroad company of the provisions of the act of 1869; consequently, it is argued, the act fell so far as it gave the company the right to hold property which it was not previously entitled to hold for the purposes specified in its charter, and

so far as it enlarged its corporate powers. The constitutional provisions just cited have no bearing upon the present case. The act of 1869 is not a "grant of special or exclusive privileges," within the meaning of those provisions. It is a grant of lands to a railroad corporation, to be used, part of them as passenger depot grounds, and part of them for the purpose of improving a harbor, and thereby promoting commerce and navigation upon public navigable waters. That the act had the effect to increase the corporate powers of an existing corporation, and enable it to engage in business not embraced in its original charter, does not bring the act within the operation of section 2 of article 11. Section 2 is to be interpreted in connection with section 1; and, so interpreted, it is clear that the framers of the constitution intended to strike down all corporations then existing which, within ten days after that instrument took effect, were still unorganized, or were not in operation as corporations. There was no purpose to take away any additional special or exclusive privileges granted to corporations, organized and in actual operation, as was the Illinois Central Railroad Company, at the time the constitution was submitted to the popular vote, or to interfere with any grant of land made by the State before that date.

An argument much pressed in behalf of the State and the city is that a mere legislative grant of lands can not be made effectual for any purpose; since by section 25, article 4, constitution of 1848, "all grants and commissions shall be sealed with the great seal of the State, signed by the governor, or person administering the government, and countersigned by the secretary of state." The contention is that the issuing of a completed patent was necessary to vest the title; and whether it should issue even after the legislature had expressed the intention of parting with the State's title was, under the constitution, for the governor to determine; and that until that determination was evidenced by a grant signed by him, or by the person administering the government, and sealed with the great seal of the State, no title passed. A similar question arose in *Rutherford* v. *Greene's Heirs*, 2 Wheat., 196, 199. In 1780 the State of North Carolina passed an act reserving a certain tract of country for the officers and soldiers of the line of that State. In 1782 another act was passed for the relief of the officers and soldiers of the Continental line, the tenth section of which allotted and gave 25,000 acres of land to Maj. Gen. Nathanael Greene, his heirs and assigns, within the bounds reserved for the use of the army, to be laid off by commissioners, as a mark of the high sense which North Carolina entertained "of the extraordinary services of that brave and gallant officer." In opposition to the title of Greene's heirs, it was contended that the legislative enactment was ineffectual as a grant, under the provision of the constitution of that State which declared "that there shall be a seal of this State which shall be kept by the governor and used by him as occasion may require, and shall be called the 'Great Seal of the State of North Carolina,' and be

affixed to all grants and commissions." Chief Justice Marshall, speaking for the whole court, said: "This legislative act, it is said, can not amount to a grant, since it wants a formality required by the constitution. This provision is so obviously intended for the completion and authentication of an instrument attesting a title previously created by law—which instrument is obviously the mere evidence of prior legal appropriation, and not the act of original appropriation itself—that the court would certainly have thought it unnecessary to advert to it had not the argument been urged repeatedly and with much earnestness by counsel of the highest respectability." The court held that the act of the legislature vested a title in Gen. Greene to 25,000 acres, and that the survey thereof, made pursuant to the statute, gave precision to that title and attached it to the land. This case was referred to with approval in *Fremont* v. *U. S.*, 17 How., 542, 559. We are of opinion that whatever may be the scope of the provision of the State constitution declaring that all "grants" shall be sealed with the great seal of the State, and signed by the governor, or the person administering the government, it was not intended to withhold from the legislature the power by statute to pass a complete legal title to lands belonging to the State.

Other objections to the act of 1869, founded on specific provisions of the State constitution, are made. Some of them are not deemed of sufficient gravity to require special notice, while, in respect to others, the conclusion reached upon the points examined renders it unnecessary to consider them.

Proceeding, then, to the examination of questions involving the construction of the Lake Front act of 1869, and the effect of the repealing act of 1873, we observe that the third section of the act of 1869 *confirms* "the right of the Illinois Central Railroad Company under the grant from the State in its charter, * * * and under and by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident to such grant, appropriation, occupancy, use, and control in and to the lands, submerged or otherwise, lying east of the said line, running parallel with and 400 feet east of the west line of Michigan avenue in fractional sections 10 and 15." This confirmation covers all that was done by the railroad company prior to April 16, 1869, in the way of filling in the lake, and constructing wharves, slips, piers, tracks, warehouses, etc., between Chicago River and the north line of Randolph street. It also covers the occupancy and use by it for way-ground of the two triangular pieces of ground immediately south of Randolph street. We have already expressed the opinion that what was done in these respects by the railroad company was to be justified by its riparian ownership, by its charter, and by the city ordinances of 1855 and 1856. If, however, we should be in error in so holding, it is clear that its action, in the particulars just stated, was legalized by the confirmatory clause of section 3 of the act of 1869. If what was done by the railroad company

prior to April 16, 1869, in the localities discussed in that clause, had been done under legislative authority previously conferred, the company would undoubtedly have acquired thereby property rights that could not have been taken from it except upon compensation. But subsequent legislative ratification or confirmation of what was done is equivalent to original authority. (*Grenada Co. Sup'rs* v. *Brogden*, 112 U. S., 271, 5 Sup. Ct. Rep. 125; *Anderson* v. *Santa Anna*, 116 U. S., 364, 6 Sup. Ct. Rep. 413.) This being so, it was beyond the power of the State, consistently with the constitution of Illinois, or the Constitution of the United States, to revoke that confirmation, as was attempted to be done by the repealing act of 1873. But the most important provision in the act of 1869 is the one granting in fee to the Illinois Central Railroad Company, its successors and assigns, all the right and title of the State in and to the submerged lands on the east front of the city of Chicago, constituting the bed of Lake Michigan, and lying east of the breakwater of the company, for the distance of 1 mile, and between the south line of the south pier [near Chicago River] extended eastwardly and a line extended eastward from the south line of lot 21, south of and near to the round house and machine shops of said company. This and other grants to the Illinois Central Railroad Company in the act of 1869 were declared therein to be upon the express condition that the company shall "perpetually pay into the treasury of the State the per centum on the gross or total proceeds, receipts, or income derived from said road and branches stipulated in its charter, and also the per centum on the gross receipts of said company reserved in this act."

What was the effect of the repealing act of 1873 upon the grant of submerged lands? It is contended by the railroad company that the repealing act of 1873 is inoperative and void, for the reason, among others, that its provisions are repugnant to that clause of the constitution of Illinois, in force at the time of the passage of the act of 1869, which provides that "no contract, obligation, or liability of the Illinois Central Railroad Company to pay any money into the State treasury, nor any lien of the State upon or right to tax property of said company, in accordance with the provisions of the charter of said company, approved February 10, in the year of our Lord 1851, shall be released, suspended, modified, altered, remitted, or in any manner diminished or impaired by legislative or other authority." The repeal of the act of 1869 does not purport to release, suspend, modify, alter, remit, diminish, or impair any contract, obligation, or liability, of the company, or any lien of the State, or any right of the State to tax the property, arising *under the company's charter of 1851.* Consequently the repeal is not in violation of the constitutional provision referred to. The company also insists that it was beyond the power of the legislature to withdraw this grant, especially after the company's acceptance of the act of 1869, and after it had incurred, as it claims to have done, large expenditures, upon the faith that the provisions of said act would be respected by the State and the

city. Upon a careful consideration of all that has been said upon this important and difficult question, the court is of opinion that, as respects the submerged lands constituting the bed of the lake, and expressly granted by the third section of the act of 1869, the repealing act of 1873 did not infringe any legal right of the company, and was a valid exercise of legislative power.

It is clear that, in respect to these submerged lands, the act of 1869 imposed upon the company no duty or obligation that was enforceable by legal proceedings. The act was passed before the General Government had, in the interest of commerce, adopted any plan for an outer harbor at the city of Chicago. And we agree with one of the learned counsel of the railroad company when he says that, looking at the terms of the grant, the nature and situation of the land granted, and all the attendant circumstances of which the court may properly take cognizance, it is manifest that the intention of the legislature was to enable that company, in the interest of commerce, and therefore for public purposes, to construct an outer harbor at Chicago, and to invest it with power to build, maintain, and lease wharves and docks for the use of shipping. The ownership of the soil under the lake would have been of no practical value to the railroad company for any purpose, except those just stated. A trust was engrafted upon the fee in the submerged lands for the benefit of the public, and not for the aggrandizement of the railroad company. This interpretation of the act is fortified by the prohibition upon the company's granting, selling, or conveying the fee—a restriction upon its power of dealing with these lands inconsistent with an absolute title thereto. It is further sustained by the declaration that nothing in the act should authorize obstructions to the harbor, or the impairment of the public right of navigation; and by the reservation of the right of the general assembly to regulate "the rates of wharfage and dockage to be charged in said harbor." In short, the legislature intended by the act of 1869 to secure such improvement of the harbor of Chicago as was demanded by the large commerce of the lake, and to that end proposed to place certain resources of the State at the command of the railroad company, as an agency of the State, with such an enlargement of its powers and privileges as would enable it to accomplish the public objects in view. Whether the railroad company in due time, and in a legal mode, accepted the provisions of the statute, and whether any formal acceptance of those provisions upon its part was necessary, are questions elaborately discussed at the bar. Without determining either of those questions, we assume, for the purposes of this case, that such an acceptance was made, in proper form, and so as to invest the company with the power, not given in its original charter, of erecting and maintaining wharves, docks, and piers, in the interest of commerce, and beyond the necessities or legitimate purposes of its own business as a railroad corporation. We are nevertheless unable to perceive why it was not competent for the State, by subsequent legislation repealing the act of 1869, to withdraw these

additional powers of the company, thereby restricting it to the business for which it was incorporated, and to resume control of the resources and property which it had placed at the command of the company for the improvement of the harbor. When the act of 1869 was passed, it was deemed best for the public interests that the improvement of that harbor should be effected by the instrumentality of a railroad corporation interested to some extent in the accomplishment of that result. But if the State subsequently determined upon considerations of public policy, that this great work should not be intrusted to any railroad corporation, and that a corporation should not be the owner of even a qualified fee in the soil under the navigable waters of the harbor, no provision of the national or State constitution forbade the general assembly of Illinois from giving effect, by legislation, to this change of policy. It can not be claimed that the repeal of the act of 1869 took from the company a single right conferred upon it by its original charter. That act only granted additional powers and privileges for which the railroad company paid nothing, although, in consideration of the grant of such additional powers and privileges, it agreed to pay a certain per centum of the gross proceeds, receipts, and incomes which it *might* derive, either from the lands granted by the act, or from any improvements erected thereon. But it was not absolutely bound, by anything contained in the act, to make use of the submerged lands for the purposes contemplated by the legislature—certainly not within any given time—and could not have been called upon to pay such a per centum until after the lands were used and improved, and income derived therefrom. The repeal of the act relieved the corporation from any obligation to pay the per centum referred to because it had the effect to take from it the property from which alone the contemplated income could be derived. So that the effect of the act of 1873 was only to remit the railroad company to the exercise of the powers, privileges, and franchises granted in its original charter, and withdraw from it the additional powers given by the act of 1869 for the accomplishment of certain public objects.

The only suggestion of weight against the validity of the repealing act of 1873 is to the effect that after the passage of the act of 1869, and before its repeal, the railroad company had made extensive and costly improvements upon the faith of the grant of the submerged lands, and that the repeal operates to take from it property interests without compensation being made. If the repealing act were attended by any such result, the court would not hesitate to hold that the company could not be deprived of the use of any structures erected or improvements made upon these lands on the faith of the act of 1869, except upon compensation being made to it. But, in fact, no such case is presented, in respect to the submerged lands granted by the third section of the act of 1869, except that an insignificant part of those lands, east of the company's breakwater of 1869, marked on map C, "Built 1873," was reclaimed from the lake by filling in before the act of 1873 was passed. The structures

erected after the passage of the act of 1869, and before its repeal, between Chicago River and Randolph street, and those south of Park Row, were erected, as we have seen, either under the power conferred upon the company by its charter, or with the consent, express or implied, of the city, or in the exercise of its rights as riparian owner of lots or ground on the shore of the lake. Indeed, it is apparant, with the slight exception just stated, that no expenditures were incurred by the railroad company, prior to the repealing act of 1873, distinctly upon the faith of the grant of submerged lands in the third section of the act of 1869.

In support of the position that the legislature could not constitutionally recall this grant of submerged lands, counsel for the company confidently rely upon *Fletcher* v. *Peck*, 6 Cranch, 87. In that case, it was said, among other things: "The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is therefore always estopped by his own grant. Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term 'contract,' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former." This general language must be interpreted with reference to the facts and issues in the particular case in which it is used. The case of *Fletcher* v. *Peck* was this: A statute of Georgia directed certain portions of the vacant lands of that State to be sold to James Gunn and others, constituting the Georgia Company, at a named price. Upon the payment of $50,000 by the purchasers, the governor was required to issue and sign a grant for the same, taking a mortgage to secure the balance, $200,000, payable at a designated time. The cash payment was made, and a grant was signed and issued by the company. The estate passed ultimately into the hands of a purchaser for a valuable consideration, without notice, and *thereafter* the legislature of Georgia repealed the original act outright. The question presented was whether such repeal could affect the vested rights *of that purchaser*. The court adjudged that the State was restrained, "either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void." Had the legislature of Georgia repealed the original act before the first purchaser made payment therefor, and before the governor had signed and issued the grant, and taken the required mortgage, the repeal would not have been open to the objection that it took away a vested estate acquired, under valid legislation, by a subsequent purchaser without notice. It is clear that the present case is not controlled by *Fletcher* v.

Peck. The railroad company was not a purchaser of the submerged lands. It paid nothing for them. It only assumed to pay a certain per centum of any income that might be derived from the use of the lands, but it did not come under any enforceable obligation to use them. In short, it accepted the grant of the submerged lands with the knowledge that the only purpose of the State was to improve the harbor of Chicago by the construction and maintenance of wharves, docks, and piers, in aid of commerce on the lake, but without assuming any obligation to make the improvements contemplated. The repeal of the act making the grant was therefore nothing more than a change of policy upon the part of the State, which took from the company no franchise or privilege secured by its charter. The State, in effect, only revoked the license which had been granted to the company to improve the harbor of Chicago, and discharged it from every obligation it might have incurred by entering upon and completing that work.

Upon the whole case, we are of opinion that the effect of the repealing act of 1873 was to withdraw from the railroad company as well the grant of the submerged lands described in the third section of the act of 1869 as the additional powers therein conferred upon it, by implication, to engage in the business of constructing and maintaining wharves, piers, and docks for the benefit of commerce and navigation generally, and not in the prosecution of its business as defined and limited by its original charter; saving to the company the right to hold and use, as part of its way-ground or right of way, the small part of the submerged lands outside of its breakwater of 1869, between Monroe and Washington streets, extended eastwardly, which was reclaimed—presumably upon the faith of the act of 1869—from the lake in 1873, and is marked on Map C "Built, 1873." Such repeal was attended with the further result that while the city of Chicago may, under its charter, preserve the harbor, prevent obstructions being placed therein, and make wharves and slips at the ends of streets, the exercise of those powers, and the whole subject of the development or improvement of the harbor by a system of wharves, docks, piers, and other structures, is with the State, subject only to the paramount authority of the United States under the power of Congress to regulate commerce.

Several important questions were made in reference to the grant, in the fourth section of the act of 1869 to the Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company, of all right and title of the State in and to the lands submerged or otherwise lying north of the south line of Monroe street and south of the south line of Randolph street, and between the east line of Michigan avenue and the track and roadway of the Illinois Central Railroad Company. But for the purpose of disposing of this branch of the case it is only necessary to say that, construing sections 5 and 6 in connection with section 4, it is clear that

this grant was upon condition that those railroad companies should pay to the city a named sum, in installments, and within a fixed time; and if the tender of the first installment of $200,000 to the comptroller was binding upon the city, the subsequent return of the money to the railroad companies, at their request, deprived them of whatever benefit accrued from that tender, leaving them in the attitude of never having performed the conditions upon which they were to acquire the title to those lands. So that the title remains just where it was before the passage of the act of 1869, namely, in the city of Chicago, in virtue of the recorded subdivision into lots, streets, and public grounds of fractional section 15 and of the southwest quarter of fractional section 10.

In the case of *U. S.* v. *Illinois Cent. R. Co.* it may be said that, upon the demurrer which has been filed, the court can only take into consideration the allegations of the information and such matters as are within its judicial knowledge. It can not bring into that case, as now presented, facts which may have been proven in other cases. The demurrer is sustained, except as to that part of the information which alleges, in substance, that the Illinois Central Railroad Company claims the absolute ownership of, and threatens to take possession of, use, and occupy, the outer harbor of Chicago. It is the opinion of the court that the General Government, upon the showing made by it, has no title to any of the streets or grounds described in said information, and has no standing in court, except so far as it seeks to protect the said harbor against obstructions that would impair the public right of navigation or interfere with any plan devised by the United States for the development or improvement of the harbor.

What has been said is sufficient to dispose of all the questions in these causes which, in the judgment of the court, it is necessary to decide. Counsel will prepare and submit to the court such orders or decrees as will be in conformity with the foregoing views.

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